THE SECTION FIVE QUAGMIRE

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In this Article, Professor Ruth Colker offers a four-part framework for determining whether Congress has constitutionally abrogated state sovereign immunity when it provides a cause of action for damages pursuant to its enforcement powers under section five of the Fourteenth Amendment. First, Congress must explicitly abrogate state sovereign immunity if the legislation infringes on a traditional and essential state function. Second, Congress must create an ample legislative record to justify the need for such legislation. Third, Congress must be seeking to protect interests in an area in which the Court has previously found that some genuine rights exist. This third principle, Colker argues, primarily applies when Congress is seeking to enforce the Due Process Clause, because genuine rights exist for all classes of persons under the Equal Protection Clause. Fourth, Congress's enforcement efforts under section five must not, themselves, violate another provision of the Constitution. This fourth principle most often arises when Congress seeks to enforce the Equal Protection Clause. Colker argues that the fourth principle has caused the most confusion in the lower courts. She argues that lower courts are wrong to conclude that the mere fact that legislation relies, in part, on a "special protection" perspective rather than on a "color-blind" perspective means that it conflicts with the Fifth Amendment's Equal Protection Clause. Applying this framework to Title II of the Americans with Disabilities Act, Colker argues that the private cause of action for damages against state actors is constitutional.

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INTRODUCTION

In what could be considered the *Brown v. Board of Education*[1] for the law of disability discrimination, the United States Supreme Court ruled in *Olmstead v. L.C.*[2] that undue institutionalization and segregation[3] of individuals with disabilities by state actors qualifies as unlawful "discrimination" under Title II of the Americans with Disabilities Act (ADA Title II).[4] Although the employment title of the ADA[5] has received the most attention in the media[6] and the courts,[7] ADA Title II is of equal importance to individuals

1. 347 U.S. 483, 495 (1954) (repudiating the "separate but equal" doctrine).

2. 119 S. Ct. 2176 (1999).

3. The Court implicitly endorsed the "integration regulation" promulgated by the Department of Justice under Title II of the Americans with Disabilities Act (ADA Title II) in which it required state actors to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (1998). The *Olmstead* Court did not have to determine the validity of these regulations because the state did not challenge the regulatory formulations themselves. *See Olmstead*, 119 S. Ct. at 2183.

4. ADA Title II, 42 U.S.C. §§ 12131–12150 (1994). This title provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *Id.* § 12132. A "public entity" includes "any State or local government." *Id.* § 12131(1)(A).

5. 42 U.S.C. §§ 12101–12213 (1994 & Supp. III 1997).

6. *See* Linda Greenhouse, *The Justices Decide Who's in Charge*, N.Y. TIMES, June 27, 1999, § 4, at 1.

7. Of the 75 cases heard by the Court last term, four of them involved the ADA's employment title. *See* Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162, 2174 (1999) (holding that an employer who requires as a job qualification that an employee meet an otherwise applicable federal safety regulation need not justify enforcing the regulation solely because its standard may be waived in an individual case); Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2149 (1999) (holding that the determination of whether an individual is disabled should be made with

with disabilities.[8] With the unemployment rate for individuals with disabilities hovering around 70 percent,[9] many of these individuals are dependent upon state programs and services for their very survival.[10] ADA Title II directly prohibits discrimination on the basis of disability by state actors and provides for a broad array of relief, including retrospective damages.[11] The

reference to measures that mitigate the individual's impairment, and that the plaintiffs failed to properly allege that the employer "regarded" them as having a disability within the meaning of the ADA); Murphy v. United Parcel Service, Inc., 119 S. Ct. 2133, 2137 (1999) (holding that the lower court correctly evaluated the plaintiff in his medicated state to determine whether he was an individual with a disability, and that the lower court correctly determined that the plaintiff was not regarded as disabled); Cleveland v. Policy Management Sys. Corp., 119 S. Ct. 1597, 1600 (1999) (holding that pursuit and receipt of Social Security Disability Insurance benefits do not automatically estop the recipient from pursuing an ADA claim).

8. There is no way to know precisely how many claims have been filed under ADA Title II, because such figures are not officially available from the court system. Through a Westlaw search, I was able to locate 122 nonemployment actions brought against public entities that resulted in reported appellate decisions between 1992 and 1998. *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 n.7 (1999). Although not all ADA Title II claims were for retrospective damages, it is reasonable to assume that such a remedy was sought in nearly every employment discrimination claim.

9. *See* Diane E. Lewis, *Access and Closed Doors: Despite Federal Act, Number of Disabled with No Job Is Rising*, BOSTON GLOBE, July 4, 1999, at G7 (reporting that pollster Louis Harris & Associates "found that 71 percent of people with disabilities who are of working age were unemployed in 1998, 5 percentage points higher than in 1986, when the study was first conducted").

10. The plaintiffs in *Olmstead* were dependent on state services. L.C. and E.W. are mentally retarded; L.C. has been diagnosed with schizophrenia, and E.W. with a personality disorder. *See* Olmstead v. L. C., 119 S. Ct. 2176, 2183 (1999). Other individuals with disabilities are capable of gainful employment but are in need of state educational programs to improve their skills and abilities. *See, e.g.*, Petersen v. Hastings Pub. Sch., 31 F.3d 705, 705–06 (8th Cir. 1994) (challenging the method of instruction that is used for children with hearing impairments). Yet other individuals with disabilities have obtained state employment but need antidiscrimination protections at the workplace. *See, e.g.*, Kilcullen v. New York State Dep't of Transp., 33 F. Supp. 2d 133 (N.D.N.Y. 1999) (challenging a termination under ADA Title II).

11. ADA Title II incorporates the remedies of section 504 of the Rehabilitation Act of 1973. *See* 42 U.S.C. § 12133 (1994) ("The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title."). Section 794a provides that Title VII of the Civil Rights Act of 1964 (CRA Title VII) remedies apply for employment discrimination complaints and that Title VI of the Civil Rights Act of 1964 (CRA Title VI) remedies apply for all other types of complaints. *See* 29 U.S.C. § 794a. There is no question that CRA Title VII permits awards for retrospective damages. *See* 42 U.S.C. § 2000e-5(g)(1) (providing for back pay or "any other equitable relief as the court deems appropriate"); *see also* Civil Rights Act of 1991, *id.* § 1981a(b)(1) (providing for compensatory but not punitive damages against state defendants). CRA Title VI does not explicitly provide for damages relief, but it has been interpreted to provide for retrospective damages in cases of intentional discrimination. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 598 (1983) (providing that intentional discrimination is a prerequisite to recovery for compensatory damages). In 1986, Congress also amended CRA Title VI to make it clear that it was abrogating state sovereign immunity under Title VI. *See* Rehabilitation Act Amendments of 1986, Pub L. No. 99-506, 100 Stat. 1807, 1845 (codified as 42 U.S.C. § 2000d-7). The incorporation of the CRA Title VI remedial scheme into the ADA context creates some interpretation problems, because discrimination under the

disability community, therefore, applauded the pro-plaintiff holding in *Olmstead* as a welcome tool in its efforts to provide dignity in the lives of its members.[12]

The *Olmstead* victory, however, may be pyrrhic. The Court may be on the brink of ruling that ADA Title II exceeds Congress's enforcement authority under section five[13] of the Fourteenth Amendment[14] and thereby unconstitutionally abrogates the states' sovereign immunity under the Eleventh Amendment[15] when it provides for a private right of action for damages. Continuing with a recent trend,[16] the Supreme Court ruled in three non–civil rights cases last term that Congress improperly abrogated the states' sovereign immunity in providing for private damages actions in suits against state defendants.[17] Most recently, the Supreme Court ruled in *Kimel v.*

ADA can be found for failure to provide reasonable accommodations. It is not clear whether compensatory damages should be available in such cases, because a failure to provide reasonable accommodation may not necessarily meet the intent standard under CRA Title VI. This problem is beyond the scope of this Article but was discussed at some length by the trial court judge in *Bartlett v. New York State Board of Law Examiners*, 970 F. Supp. 1094, 1149–51 (S.D.N.Y. 1997), *aff'd in part and vacated in part*, 156 F.3d 321 (2d Cir. 1998), *cert. granted and judgment vacated*, 119 S. Ct. 2388 (1999).

12. *See, e.g.*, David G. Savage, *Justices Reject 'Unnecessary Segregation' of Mentally Disabled at State Hospitals*, L.A. TIMES, June 23, 1999, at A10.

> For disability-rights activists, the case was hailed as the "Brown v. Board of Education decision" for the disabled, a reference to the 1954 ruling that outlawed racial segregation in public schools. In California, a coalition representing 24 groups statewide that help persons with disabilities called the ruling "a milestone for the independent-living movement."

Id.

13. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

14. *See* Interview with Professor Leon Friedman, *Morning Edition* (National Public Radio broadcast, June 24, 1999) (saying that the "bottom line" from the Supreme Court's federalism decisions is that the ADA and other civil rights statutes are "out the window").

15. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

This Article does not consider whether ADA Title II could be found to be unconstitutional under the Tenth Amendment as improperly commandeering the states. *See* New York v. United States, 505 U.S. 144, 176 (1992) (holding that a congressional act that commandeers state legislatures violates the Tenth Amendment).

16. *See* City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (determining that Congress had exceeded its enforcement authority under section five of the Fourteenth Amendment in enacting the Religious Freedom Restoration Act); Seminole Tribe v. Florida, 517 U.S. 44, 57 (1996) (holding that Congress lacked authority under the Indian Commerce Clause to abrogate the states' Eleventh Amendment immunity under the Indian Gaming Regulatory Act).

17. *See* Alden v. Maine, 119 S. Ct. 2240, 2266 (1999) (invalidating the private damages remedy under the Fair Labor Standards Act as it applies to the states even when sued in state court); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2225 (1999) (invalidating the private damages remedy under the Trademark Remedy Clarification Act as it applies to the states); Florida Prepaid Postsecondary Educ. Expense Bd. v. College

Florida Board of Regents[18] that Congress exceeded its authority under the Age Discrimination in Employment Act (ADEA) by abrogating state sovereign immunity in creating a private right of action for damages against state officials. *Kimel* is the first decision to conclude that Congress exceeded its authority to enact legislation in the civil rights area.

The ADEA is not the only civil rights statute to come under attack in recent years as exceeding Congress's powers under section five of the Fourteenth Amendment. Lower courts have struck down the private damages action provided against state defendants under the ADA,[19] the Equal Pay Act (EPA),[20] and the Family and Medical Leave Act (FMLA).[21] Although so far unsuccessful, state defendants

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Sav. Bank, 119 S. Ct. 2199, 2211 (1999) (invalidating the private damages remedy under the Patent and Plant Variety Protection Remedy Clarification Act as not sustainable under the Fourteenth Amendment's Due Process Clause).

18. Nos. 98-791, 98-796, 2000 WL 14165 (U.S. Jan. 11, 2000).

19. *See infra* Part III.A.

20. Equal Pay Act, 29 U.S.C. § 206(d); *see* Larry v. Board of Trustees, 996 F. Supp. 1366, 1368 (N.D. Ala. 1998) (finding that Congress does not have the power to abrogate the states' Eleventh Amendment rights with regard to the Equal Pay Act). *But see* Belch v. Board of Regents, 27 F. Supp. 2d 1341, 1344 (M.D. Ga. 1998) (finding that abrogation of state sovereign immunity under the Equal Pay Act was a permissible exercise of Congress's enforcement power under section five of the Fourteenth Amendment); Perdue v. City Univ., 13 F. Supp. 2d 326, 338 (E.D.N.Y. 1998) (finding that Congress properly enacted the Equal Pay Act pursuant to section five of the Fourteenth Amendment).

21. Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601–2654 (1994 & Supp. III 1997); *see* Kilvitis v. County of Luzerne, 52 F. Supp. 2d 403, 419 (M.D. Pa. 1999) (holding that the FMLA exceeded Congress's enforcement powers under section five); Driesse v. Florida Bd. of Regents, 26 F. Supp. 2d 1328, 1332 (M.D. Fla. 1998) (holding that Congress did not provide unequivocal and textual evidence of its intent to abrogate state immunity under the FMLA, and that the FMLA exceeded Congress's enforcement powers under section five); McGregor v. Goord, 18 F. Supp. 2d 204 (N.D.N.Y. 1998) (holding that an FMLA damage suit against a state was not a valid exercise of Congress's section five powers); Thomson v. Ohio State Univ. Hosp., 5 F. Supp. 2d 574, 577 (S.D. Ohio 1998) (holding that the FMLA exceeded Congress's enforcement powers under section five).

The Violence Against Women Act has also been challenged on section five grounds. *See* Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 16, 18, 28, and 42 U.S.C. (1994)); *see also* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820 (4th Cir. 1999); Bergeron v. Bergeron, 48 F. Supp. 2d 628, 636–38 (M.D. La. 1999) (finding that Congress exceeded its powers under the Commerce Clause and the Fourteenth Amendment in enacting the Violence Against Women Act). *But see* Ericson v. Syracuse Univ., 35 F. Supp. 2d 326, 328 (S.D.N.Y. 1999) (finding that the Violence Against Women Act is a lawful exercise of Congress's power under the Commerce Clause).

The Violence Against Women Act does not regulate state government, but the Fourth Circuit has considered whether it can be justified under section five of the Fourteenth Amendment, because it has concluded that the statute cannot be justified under the Commerce Clause. *See Brzonkala*, 169 F.3d at 862. Because defendants in actions brought under the Violence Against Women Act are typically private defendants, the section five issue for this statute is whether

have challenged the private damages action permitted for disparate-impact claims under Title VII of the Civil Rights Act of 1964 (CRA Title VII).[22] In light of the Supreme Court's decision in *Kimel*, one can easily predict that the constitutionality of ADA Title II's enforcement scheme will be considered in a subsequent term.[23]

These challenges to the civil rights acts are based on the general Eleventh Amendment rule that states are immune from private suits.[24] Two important exceptions to this rule exist. First, private plaintiffs can sue state officials for *injunctive relief*, although not for *retrospective damages*, under the holding in *Ex Parte Young*.[25] Second, Congress may abrogate the states' Eleventh Amendment immunity and permit private plaintiffs to sue states

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Congress can use section five to regulate private actors. Whether section five should be construed so as always to require Congress to directly regulate state action is beyond the scope of this Article. For an argument that state action should not be required under section five, see generally Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964) (arguing that the framers of the Fourteenth Amendment intended congressional enforcement power to extend to private acts).

22. CRA Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1994 & Supp. III 1997); *see, e.g.*, Reynolds v. Alabama Dep't of Transp., 4 F. Supp. 2d 1092 (M.D. Ala. 1998) (finding that Congress did not exceed its section five authority when it subjected the states to liability for Title VII disparate impact claims of discrimination). A similar challenge could be brought against the Civil Rights Act of 1991. *See* Civil Rights Act of 1991, § 105(a), 42 U.S.C. § 2000e-2(k)(1)(A) (1994) (providing for a disparate impact theory against state actors and compensatory damages).

23. The Eleventh Circuit's decision in *Kimel v. Florida Bd. of Regents* involved the constitutionality of both the ADEA's and the ADA's enforcement schemes in a consolidated appeal of three lower court cases. *See* Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1433 (11th Cir. 1998), *aff'd*, 2000 WL 14165. The plaintiffs sought certiorari to challenge the ADEA determination, and one state sought certiorari to challenge the ADA determination. The Supreme Court decided the ADEA issue in *Kimel*, 2000 WL 14165. *See supra* note 18 and accompanying text. The Court has now granted certiorari to consider "[w]hether Congress exceeded the scope of its authority to 'enforce' the Fourteenth Amendment when it made the broad employment provisions of Title I of the Americans with Disabilities Act applicable to the states," *see* Florida Dep't of Corrections v. Dickson, No. 98-829, 2000 WL 46077 (U.S. Jan. 20, 2000), and in a separate case that has been consolidated with *Dickson* the Court will consider "[w]hether the ADA was a proper exercise of the power granted to Congress by Sec. 5 of the Fourteenth Amendment . . . such that the immunity granted to the State of Arkansas by the Eleventh Amendment . . . was abrogated," *see* Alsbrook v. City of Maumelle, No. 99-423, 2000 WL 63302 (U.S. Jan. 25, 2000).

24. Although the text of the Eleventh Amendment refers only to suits commenced by citizens of another state, the Supreme Court has interpreted it also to protect states against suits brought by citizens of their own state. *See* Hans v. Louisiana, 134 U.S. 1, 20 (1890). The Eleventh Amendment has not eradicated all lawsuits against the states, because the Supreme Court held in *Ex Parte Young*, 209 U.S. 123, 167 (1908), that a federal court could issue an injunction against a state officer executing an unconstitutional state statute, on the ground that the state was not really a defendant (it was the officer, acting beyond his constitutional authority). The remedies permissible against a state were considered again in *Edelman v. Jordan*, 415 U.S. 651 (1974), when the Court held that the Eleventh Amendment permits lawsuits for prospective injunctive relief against state officers, but not lawsuits for retrospective damages relief. *See id.* at 678.

25. *See Ex Parte Young*, 209 U.S. at 167; *supra* note 24 and accompanying text.

directly for retrospective damages, pursuant to its power under section five of the Fourteenth Amendment, under the holding in *Fitzpatrick v. Bitzer*.[26] It may not, however, abrogate state sovereign immunity by passing legislation pursuant to the Interstate Commerce Clause, under the holding in *Seminole Tribe v. Florida*.[27] Thus, when Congress seeks to create retrospective damages relief for private individuals in suits against states, it frequently uses its powers under section five to abrogate state sovereign immunity.

Technically, the relief sought in *Olmstead*—declaratory and injunctive—should be available under *Ex Parte Young* even if the Court does conclude that Congress improperly abrogated state sovereign immunity in creating a private cause of action for damages. An alarming signal from *Olmstead* is that the Court was almost willing[28] to consider the constitutionality of the enforcement scheme under section five in a case involving injunctive or declaratory relief.[29] Further, the *Kimel* Court did not qualify its holding by noting that the ADEA should still be applicable to suits against states for injunctive or declaratory relief. As the Court continues to expand its understanding of the states' sovereign immunity,[30] it is possible that the Court will

26. 427 U.S. 445, 457 (1976) (holding that back pay and attorneys fees provided by the CRA were not precluded by the Eleventh Amendment).

27. 517 U.S. 44, 76 (1996).

28. In *Olmstead*, the Supreme Court initially granted certiorari on the question of whether ADA Title II exceeded Congress's section five enforcement powers, but it then amended its order granting certiorari to limit the case to another issue. *See* Olmstead v. L.C., 119 S. Ct. 633, 633 (1998) ("The order of December 14, 1998, granting the petition for a writ of certiorari is amended as follows: 'The petition for a writ of certiorari is granted limited to Question 1 presented by the petition.'"); Summary of Orders: Olmstead v. L.C., 67 U.S.L.W. 3385, 3386 (BNA) (U.S. Dec. 15, 1998) (listing two questions presented, with the second question reading: "If that portion of ADA is so construed [to be constitutional], does it exceed enforcement power granted to Congress in Section 5 of 14th Amendment?"). Similarly, in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212–13 (1998), the Court noted the presence of the section five jurisdictional issue but chose not to decide the issue because it was not addressed by the district court or court of appeals.

29. Distinguishing between retrospective and prospective relief is often difficult, as demonstrated by the *Olmstead* petitioners' argument that *Ex Parte Young* "does not permit suits for injunctions where the violations are not continuing and where state funds are to be used for redress of past wrongs. In the present case, the patients sought state-paid community placements—placements that the state provided and continues to provide." *See* Reply Brief of Petitioners at 6, Olmstead v. L.C., 119 S. Ct. 2176 (1999) (No. 98-536) (citation omitted). The petitioners in *Olmstead* were seeking an injunction to remove them from a segregated, institutional setting to a more integrated, community setting. Because the Court decided not to grant certiorari on the section five issue, it did not have to determine on which side of the retrospective/prospective line the petitioners' case fell. For further discussion of this distinction, see *Green v. Mansour*, 474 U.S. 64, 73 (1985) (finding that the "notice" relief sought by the plaintiffs violated Eleventh Amendment sovereign immunity principles).

30. In *Alden v. Maine*, 119 S. Ct. 2240 (1999), the Court made it clear that the "sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment." *Id.* at 2246. Although the text of the Eleventh Amendment only refers to the "Judicial power of the United States," the Court concluded in *Alden* that Congress did not have the power

narrow or overturn the holding in *Ex Parte Young*.[31] Such a decision would be lethal to ADA Title II itself. But even a more modest conclusion—that principles of state sovereign immunity preclude a private right of action for damages—would strike at the heart of ADA Title II's effectiveness. A damages cause of action provides a financial incentive for plaintiffs to bring cases to enforce their rights under ADA Title II and creates the possibility of contingent fee arrangements; a remedial scheme consisting exclusively of injunctive relief under ADA Title III has proven to be ineffective.[32]

Nonetheless, even as the Court struck down the private rights of action for damages in three non–civil rights statutes this last term, it reiterated the familiar principle that "in adopting the Fourteenth Amendment, the people required the states to surrender a portion of the sovereignty that had been preserved for them by the original Constitution, so Congress may authorize private suits against nonconsenting states pursuant to its § 5 enforcement power."[33] In addition, *Fitzpatrick v. Bitzer*,[34] which held that private plaintiffs

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under Article I of the Constitution to subject nonconsenting states to private suits in their own courts. *See id.* at 2256.

31. The *Olmstead* petitioners suggested that result when they noted in their brief:

> Surely a sudden decision to require all States to provide the "least restrictive treatment" to their citizens in State hospitals would brush up against the boundaries of section five power under the Fourteenth Amendment, if not surpass them, while at the same time imposing substantial and largely indeterminate new financial obligations on the States.

Petitioner's Brief at *15, Olmstead v. L.C., 119 S. Ct. 2176 (1999), *available at* 1999 WL 54623. Whether *Ex Parte Young* should be retained is beyond the scope of this Article.

32. Based on my research on a different part of the ADA—Title III—I conclude that injunctive relief is not an effective remedy to enforce the ADA. ADA Title III, which provides for nondiscrimination on the basis of disability at places of public accommodation, only provides for declaratory and injunctive relief in suits brought by private individuals. *See* ADA Title III, 42 U.S.C. §§ 12181–12189 (1994 & Supp. III 1997). These remedies, as predicted by Senator Harkin at the time of passage, have been ineffective in obtaining widespread Title III compliance. *See* Ruth Colker, *ADA Title III: A Fragile Compromise*, 20 BERKELEY J. EMP. & LAB. L. (forthcoming 2000). I have located 128 ADA Title II employment discrimination actions that have been reported between July 1992 and July 1998 in the courts of appeal. *See* Table (on file with author). It is very likely that retrospective damages were sought in nearly all those cases. These appellate employment discrimination actions are only a small sample of all ADA Title II cases, because they only include cases with reported appellate decisions and only include cases involving employment complaints. My research also indicates that far fewer cases have been reported under ADA Title III than under ADA Title II. There were 128 ADA Title II employment actions and 122 ADA Title II nonemployment actions reported by the courts of appeal between 1992 and 1998; by contrast, there were only 23 ADA Title III reported appellate cases. *See* Colker, *supra* note 8, at 100 n.7. One explanation for the stark contrast between the number of cases reported under ADA Title II and under ADA III is the differing remedies available to prevailing plaintiffs.

33. *Alden*, 119 S. Ct. at 2267. The Court also reaffirmed that principle in *Kimel* when it recognized that "[s]ection five of the Fourteenth Amendment," however, "does grant Congress the authority to abrogate the States' sovereign immunity." Kimel v. Florida Bd. of Regents, Nos. 98-791, 98-796, 2000 WL 14165, at *1 (U.S. Jan. 11, 2000).

34. 427 U.S. 445 (1976).

may sue states directly for retrospective damages pursuant to section five of the Fourteenth Amendment, has not been overruled. I will argue that these seemingly contradictory perspectives can be reconciled if one distinguishes the Court's section five decisions in the civil rights context from its section five decisions in the non–civil rights context.

In Part I of this Article, I examine the text, history, and case law under section five to develop a framework for considering whether legislation that abrogates the states' sovereign immunity by providing for private suits for damages is within Congress's section five powers. I argue that section five legislation must satisfy the following four principles to abrogate the states' sovereign immunity when providing a private cause of action for damages. First, Congress must explicitly abrogate state sovereign immunity if the legislation infringes on a traditional and essential state function. Second, Congress must create an ample record to justify the need for such legislation. Third, Congress must be seeking to protect interests in an area in which the Court has previously found that some genuine rights exist. This third principle, I argue, primarily applies when Congress is seeking to enforce the Due Process Clause, because genuine rights exist for all classes of persons under the Equal Protection Clause. Fourth, Congress's enforcement efforts under section five must not, themselves, violate another provision of the Constitution.

In Part II, I focus specifically on the fourth principle, because it most frequently arises when Congress seeks to enforce the Equal Protection Clause and, more specifically, has arisen in the lower courts in cases challenging the constitutionality of the ADA Title II. States typically argue that legislation enacted under section five to protect the rights of certain groups in our society under the Fourteenth Amendment's Equal Protection Clause conflicts with the equal protection rights of nonprotected groups under the equal protection guarantee found in the Fifth Amendment's Due Process Clause.[35] Because of the confusion stemming from the Court's case law interpreting the Fifth Amendment's equal protection guarantee and, specifically, its affirmative action case law,[36] this argument deserves serious consideration. I argue that the mere fact that legislation relies, in part, on a

35. The Fifth Amendment does not contain an equal protection clause, but the Court has construed the Due Process Clause to contain an equal protection guarantee similar to the one found in the Fourteenth Amendment's Equal Protection Clause. *See infra* Part II.

36. The Court has waffled about what kind of affirmative action may violate the rights of nonprotected class members, especially when the challenges have been brought under the Fifth Amendment's Due Process Clause. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (overruling prior precedent on the level of scrutiny required under the Fifth Amendment for reverse discrimination challenges). For a discussion of the Court's current standard, see *infra* Part II.

"special protection" or "antisubordination"[37] perspective rather than on a "color-blind" or "antidifferentiation"[38] perspective does not mean that it conflicts with the Fifth Amendment's equal protection guarantee.

In Part III, I apply these principles to ADA Title II, arguing that Congress has explicitly abrogated state sovereign immunity, has created a sufficient legislative record to justify the need for the legislation, and is acting on behalf of a group with genuine constitutional rights, and that ADA Title II's "special protection" rules do not result in a violation of the Fifth Amendment's equal protection guarantee.

I. SECTION FIVE

A. Text of the Fourteenth Amendment

Section five of the Fourteenth Amendment provides that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[39] Section five thus extends power to Congress to pass "appropriate legislation" that "enforces" the Fourteenth Amendment. A part of "this article" which section five gives Congress the power to enforce is section one.[40] Section one of the Fourteenth Amendment provides, in part, that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[41] It proscribes what actions a state may take that would deprive persons of the equal protection of the laws. It applies when individuals sue the states for violating their right to the equal protection of the law.

Unlike section one, section five is not primarily a provision *limiting* action by a governmental entity. Whereas section one begins with the language "No State shall," section five begins with the language "The Congress shall have power." While section one limits the powers of state governments, section five grants powers to Congress. As I argue below, the framers and ratifiers of section five intended to give Congress broad powers to enforce the Equal Protection Clause.

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37. "Under the anti-subordination perspective, it is inappropriate for certain groups in society to have subordinated status because of their lack of power in society as a whole." *See* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986).

38. "Under the anti-differentiation perspective, it is inappropriate to treat individuals differently on the basis of a particular normative view about race or sex." *Id.* at 1005.

39. U.S. CONST. amend. XIV, § 5.

40. Sections two through four of the Fourteenth Amendment can also be enforced by Congress. However, those sections are not relevant to this Article.

41. U.S. CONST. amend. XIV, § 1.

B. History of Section Five

The Joint Committee on Reconstruction drafted the Fourteenth Amendment and proposed it to Congress after hearing testimony on conditions in the South following the Civil War.[42] This testimony revealed the shocking reality that the ex-Confederate states were not willing to enforce the laws against homicide and assault and battery to protect the interests of recently freed African Americans. This failure of enforcement caused one individual to testify, "That seems to me the worst indication of the state of society there—worse than the fact that these things take place."[43]

Not only did the framers of the Fourteenth Amendment enormously distrust the states, but they also viewed the judiciary with considerable skepticism. The judiciary had not formally favored abolitionists before the Civil War. "There was consequently little inclination to bestow new powers on the judiciary, but rather to lean on an augmented power of Congress, if it could be controlled."[44]

Professor Laurent Frantz used this historical material to argue that the framers of the Fourteenth Amendment did not intend to create a state action requirement to limit Congress's powers under the Fourteenth Amendment.[45] Although Professor Frantz may be correct in his historical view, the Supreme Court has refused to adopt such a broad view of section five of the Fourteenth Amendment.[46]

As we will see below, a more limited argument by Professor Frantz has been accepted by the Supreme Court—that the framers did not intend to limit the scope of Congress's powers under section five to situations that the judiciary had already declared violated section one.[47] Limiting Congress's powers in that way would have made little historical sense, because the framers had little confidence in the judiciary's willingness to enforce section one.

The framers of the Fourteenth Amendment were wary of the judiciary, because they were keenly aware of the judiciary's failure to respond to the problem of slavery by refusing to protect the interests of slaves prior to the

42. *See* Frantz, *supra* note 21, at 1354.

43. *Id.* at 1355 (quoting the REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION (Gov't Printing Office 1866)).

44. JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 184 (Illinois Studies in the Soc. Sciences Vol. 37, 1956).

45. *See generally* Frantz, *supra* note 21.

46. *See* The Civil Rights Cases, 109 U.S. 3 (1883) (concluding that the Civil Rights Acts cannot be justified under the Fourteenth Amendment, because the legislation was enacted under section five but was not limited to prohibiting state action).

47. *See* Katzenbach v. Morgan, 384 U.S. 641, 648 (1966).

Civil War.[48] The Supreme Court's decision in *Dred Scott v. Sandford*[49]—in which it concluded that a freed African American was not a citizen for purposes of diversity jurisdiction—became the nation's symbol of the sharp moral divide between the North and the South. The Court's decision figured prominently in the exchanges between Abraham Lincoln and Stephen Douglas during their campaign for the United States Senate in 1858.[50] Based on the widespread awareness of the *Dred Scott* decision and the evidence gathered by the Joint Committee on Reconstruction, "it is reasonable to infer that not only in the Congress, but in the ratifying legislatures, the fourteenth amendment was widely thought of as something which would empower the Congress to deal effectively with the situation depicted in the testimony."[51]

The history of section five, therefore, suggests that the framers and ratifiers did not intend merely to give Congress the power to outlaw what the Supreme Court had already concluded was unconstitutional. Instead, the framers saw section five as an important source of Congressional authority to help protect the equality interests of the recently freed slaves. Although commentators disagree about the proper scope of the state action requirement, no one disputes that the framers and ratifiers intended Congress to have broader authority under section five than merely to enforce what the Supreme Court had already decided was unconstitutional under section one. As we will see, the Supreme Court's case law interpreting Congress's power to enforce the Equal Protection Clause has been faithful to that history. It has been particularly relevant to the Court's development of the second of the four principles described below.

C. Case Law Under Section Five

Four principles can be derived from the Court's case law interpreting section five of the Fourteenth Amendment.

1. Explicit Abrogation

Under the explicit abrogation principle, Congress must use "plain language" to express its intention to regulate state and local government if such regulation intrudes on an essential state function.

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48. *See, e.g.*, Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) (holding unconstitutional a state law designed to prevent slave owners from engaging in self-help to capture their fugitive slaves).

49. 60 U.S. (19 How.) 393 (1856).

50. *See* PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 211 (3d ed. 1992).

51. Frantz, *supra* note 21, at 1355.

The explicit abrogation requirement stems from *Gregory v. Ashcroft*,[52] which questioned whether Missouri's mandatory retirement age of seventy years for its state court judges violated the ADEA.[53] Three state court judges filed suit against the governor of Missouri, arguing that the state had violated the ADEA. The state defended the lawsuit by arguing that Missouri's judges were not protected by the ADEA.

This case was decided before the Court ruled in *Seminole Tribe v. Florida* that Congress could not abrogate state sovereign immunity pursuant to legislation enacted under the Interstate Commerce Clause.[54] (The ADEA was enacted under Congress's Commerce Clause powers.[55]) Nonetheless, the Court stated that principles of federalism limit proper abrogation. The Court questioned whether principles of federalism precluded coverage of state court judges. Applying a "plain statement rule,"[56] the Court said that federalism principles require the Court to be "absolutely certain" that Congress intended these "intrusive exercises"[57] to "alter the usual constitutional balance between the States and the Federal Government."[58] While noting that section five of the Fourteenth Amendment can provide Congress with additional powers to abrogate state sovereign immunity—and the statute could arguably also be justified under section five—the Court concluded that the plain statement rule applies irrespective of whether Congress acts pursuant to the Commerce Clause or section five if the statute "intrude[s] on state governmental functions."[59] Because the Court concluded that the ADEA was too ambiguous to permit application to state court judges, it found that it could not meet the plain statement rule.[60]

In the Court's subsequent jurisprudence, it has continued to apply the plain statement rule to legislation enacted pursuant to section five. But it has also emphasized that the mere fact that legislation regulates state government and provides for retrospective damages does not necessarily trigger the plain statement rule. The legislation must also implicate principles of federalism by interfering with a core state function. Thus, in *Pennsylvania*

52. 501 U.S. 452 (1991).

53. 29 U.S.C. §§ 621–34 (1994 & Supp. III 1997).

54. 517 U.S. 44, 72–73 (1996); *see also supra* text accompanying note 27.

55. *See* William E. Thro, *The Eleventh Amendment Revolution in the Lower Federal Courts*, 25 J.C. & U.L. 501, 505 (1999).

56. *Gregory*, 501 U.S. at 461.

57. *Id.* at 464.

58. *Id.* at 460–61 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985), as cited in Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989)).

59. *Id.* at 470.

60. "In the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment." *Id.* at 470.

Department of Corrections v. Yeskey[61]—a case involving the issue of whether state prisons are covered under ADA Title II—the Court noted that the plain statement rule only applies to statutes that implicate the states' "substantial sovereign powers."[62] The Court said the appropriate question was whether "exercising ultimate control over the management of state prisons, like establishing the qualifications of state government officials, is a traditional and essential state function subject to the plain-statement rule of *Gregory*."[63] Assuming that the legislation did interfere with a core state function, the Court found that the plain statement requirement was met.

The Supreme Court again considered the explicit abrogation requirement this term under the ADEA in *Kimel*.[64] Although Eleventh Circuit Judge Edmondson had concluded that the explicit abrogation requirement had not been satisfied under the ADEA,[65] the Supreme Court rejected that conclusion. In an opinion written by Justice O'Connor and joined by Chief Justice Rehnquist and Justices Stevens, Scalia, Souter, Ginsburg, and Breyer on the explicit abrogation requirement, the Court concluded that Congress made its intentions "unmistakably clear" through the language it adopted.[66] The Supreme Court has therefore rejected the more rigorous explicit abrogation rule proposed by Judge Edmondson.[67] As I argue in Part III.B, ADA Title II easily satisfies the explicit abrogation requirement.

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61. 524 U.S. 206 (1998).

62. *Id.* at 209 (quoting *Gregory*, 501 U.S. at 460–61).

63. *Id.*

64. *Kimel* is a consolidated appeal from three lower court cases involving state sovereign immunity under the ADEA. In two of the three ADEA cases, the lower courts concluded that Congress effectively abrogated state sovereign immunity; in the third case, the lower court found that the ADEA was passed pursuant to the Commerce Clause, rather than section five, and therefore under the decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), did not provide a proper basis for abrogation of state sovereign immunity. *See supra* note 54 and accompanying text; *see also* MacPherson v. University of Montevallo, 938 F. Supp. 785 (N.D. Ala. 1996).

65. *See* Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1432 (11th Cir.), *aff'd*, Nos. 98-791, 98-796, 2000 WL 14165 (U.S. Jan. 11, 2000). Judge Cox also agreed that the ADEA did not properly abrogate state sovereign immunity, but his decision did not depend on the abrogation argument. He concluded that the ADEA was beyond Congress's enforcement powers because its rigor exceeded the requirements of the rational basis test and its use of a disparate impact theory was inconsistent with the Court's prior holdings that equal protection violations require proof of intent. *See id.* at 1447–48.

66. *See Kimel*, 2000 WL 14165, at *8–*10.

67. Only Justices Thomas and Kennedy accepted a more rigorous explicit abrogation rule in *Kimel*. *See id.* at *21 (Thomas, J., concurring in part and dissenting in part).

2. Importance of Fact Finding

Under the second principle, the Court will defer to Congress's conclusion that legislation is enacted to enforce the Fourteenth Amendment only if Congress creates an adequate legislative record.

This principle emerges from the Supreme Court's decision in *South Carolina v. Katzenbach*.[68] In that case, the Court found that Congress had the power under the Voting Rights Act to suspend literacy tests in the South under section two of the Fifteenth Amendment[69] even though the Supreme Court had unanimously ruled in 1959 in *Lassiter v. Northampton Board of Elections*[70] that such tests were constitutional. (The Supreme Court has always considered the scope of section two of the Fifteenth Amendment to be identical to the scope of section five of the Fourteenth Amendment, because the language and history of the sections is virtually identical.[71]) In reaching this conclusion, the Court emphasized that section two of the Fifteenth Amendment was intended to enlarge the remedial powers of Congress. It also readily distinguished *Lassister* by saying that Congress had ample evidence of a constitutional violation when it enacted the Voting Rights Act in response to specific practices by southern states. It interpreted the "appropriate legislation" requirement to mean that "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting,"[72] so long as it has laid a sufficient factual basis for the legislation.

The Supreme Court similarly interpreted Congress's power broadly under section five of the Fourteenth Amendment. In *Katzenbach v. Morgan*,[73] the Supreme Court was asked to consider the constitutionality of a provision of the Voting Rights Act of 1965 that stated that any person who has successfully completed sixth grade in an American school in which the predominant language is other than English shall not be disqualified from voting under any literacy test because of an inability to read or write English. The voters of New York argued that Congress only had the power to use its section five powers to prohibit conduct that the judiciary would find violated section one.[74]

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68. 383 U.S. 301 (1966).

69. Section two of the Fifteenth Amendment has similar language to that of section five of the Fourteenth Amendment. Section two reads: "The Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, § 2.

70. 360 U.S. 45 (1959).

71. *See* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

72. *South Carolina v. Katzenbach*, 383 U.S. at 324.

73. 384 U.S. 641 (1966).

74. *See id.* at 648.

The Court firmly rejected that argument, concluding that "section five is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[75] It focused on the "appropriate legislation" requirement under section five to determine whether Congress could have reasonably considered the Voting Rights Act to be an enactment to enforce the Equal Protection Clause. Congress justified the Voting Rights Act under the Equal Protection Clause by claiming that "enhanced political power [for the Puerto Rican community] will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community."[76] In an extremely deferential statement, the Court said: "It is not for us to review the congressional resolution [of these competing considerations] . . . . It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."[77] Again, Congress's factual record was central to the Court's willingness to tolerate Congress's creating standards beyond those previously established by the Court pursuant to section one.

The importance of fact finding in supporting Congress's section five authority continues to be emphasized by the Court. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[78] the Court concluded that "Congress came up with little evidence of infringing conduct on the part of the States" to justify the Patent Remedy Act.[79] "The Federal

75. *Id.* at 651.
76. *Id.* at 652.
77. *Id.* at 653.
78. 119 S. Ct. 2199 (1999).
79. *Id.* at 2207. The issue in *Florida Prepaid* was whether the lower court should have granted the agency's motion to dismiss for lack of subject matter jurisdiction. *See id.* at 2204. The lower court and appellate courts both found that proper subject matter jurisdiction was present, because the Patent Remedy Act was properly enacted pursuant to Congress's section five powers. *See id.* The Supreme Court reversed, concluding that the Patent Remedy Act could not be justified under section five. *See id.* Although College Savings Bank had sought injunctive and declaratory relief, as well as damages, the Court did *not* consider whether the lawsuit could be nonetheless maintained as a suit solely for injunctive relief under *Ex Parte Young*, although Justice Breyer assumed the continued vitality of *Ex Parte Young* in his dissent in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219, 2239–40 (1999) (Breyer, J., dissenting) ("I recognize the possibility that Congress may achieve its objectives in other ways. *Ex Parte Young* is still available, though effective only where damages remedies are not important." (citation omitted)). The question of the continued vitality of an *Ex Parte Young* theory is complicated and beyond the scope of this Article. *Compare* Alden v. Maine, 119 S. Ct. 2240, 2262–63 (1999) (mentioning *Ex Parte Young* with approval), *with* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997), *and* Seminole Tribe v. Florida, 517 U.S. 44 (1996) (refusing to permit a suit for injunctive relief under *Ex Parte Young* after also concluding that state sovereign immunity had not been properly abrogated for retrospective damages relief). It does not appear that College Savings Bank sought to use an *Ex Parte Young* theory to preserve its right to seek declaratory and injunctive relief.

Circuit in its opinion identified only eight patent-infringement suits prosecuted against the States in the 110 years between 1880 and 1990."[80] That kind of evidence was insufficient to satisfy principle number two.

The importance of Congressional fact finding was also central to the Court's decision in *Kimel*. The Court found that the fact that the ADEA

> prohibits very little conduct likely to be held unconstitutional, while significant, does not alone provide the answer to our § 5 inquiry. Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation. Our task is to determine whether the ADEA is in fact just such an appropriate remedy or, instead, merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination. One means by which we have made such a determination in the past is by examining the legislative record containing the reasons for Congress' action.[81]

The ADEA failed to meet this standard, because the Court found that "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."[82]

The *Kimel* decision suggests that the second requirement has grown in importance. Even if Congress is proceeding on a doubtful constitutional basis (as in the age discrimination area), the Courts may defer to Congress's section five powers if it creates a strong legislative record for the need for prophylactic legislative measures. This is the first time that the Court has hinted that sufficient findings of fact by Congress can overcome other constitutional difficulties under section five.

3. Enforcing a Protected Right

Under the third principle, Congress can only enforce a right that is genuinely protected under the Fourteenth Amendment.

The third principle emerges from *City of Boerne v. Flores*,[83] in which the Court considered whether Congress had the constitutional authority

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80. *Florida Prepaid*, 119 S. Ct. at 2207.

81. Kimel v. Florida Bd. of Regents, Nos. 98-791, 98-796, 2000 WL 14165, at *16 (U.S. Jan. 11, 2000).

82. *Id.*

83. 521 U.S. 507, 517 (1997). The Archdiocese of St. Peter Catholic Church sought to take advantage of the Religious Freedom Restoration Act (RFRA) to obtain a building permit to expand its facility. When the city denied the request, it brought suit under the RFRA. The city defended its zoning decision by arguing that the RFRA was unconstitutional because it exceeded Congress's enforcement authority under section five of the Fourteenth Amendment. The Supreme Court agreed with the city, concluding that the RFRA was unconstitutional.

under section five to create a private right of action against state actors under the Religious Freedom Restoration Act of 1993 (RFRA).[84] The constitutional violation that Congress sought to enforce in the RFRA was the First Amendment's Free Exercise Clause as incorporated in the Fourteenth Amendment's Due Process Clause.[85]

The backdrop to the Court's section five analysis in *City of Boerne* was its earlier decision in *Employment Division v. Smith*.[86] There the Court held that the Free Exercise Clause allows the government to prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as that prohibition is generally applicable to all persons.[87] In *Smith*, the Court went so far as to state that the Free Exercise Clause had no application at all to a situation in which a generally applicable law burdened religious practice. The Court did not merely reject the strict scrutiny test suggested by the plaintiffs, but suggested that only a very low level of scrutiny, if any, applies to such claims.[88]

Congress was not satisfied with the decision in *Smith* and sought to overturn the decision by enacting the RFRA. The RFRA required the courts to use a strict scrutiny test when laws of general applicability had a disparate impact on religious expression. The Supreme Court struck down the RFRA and cited two legislative shortcomings to support its conclusion. First, Congress failed to create an adequate legislative record to demonstrate that such legislation was necessary to enforce the Fourteenth Amendment.[89] Second,

84. 42 U.S.C. §§ 1988, 2000bb to 2000bb-4 (1994). The RFRA prohibits the government from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate that the burden: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(b).

85. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (deciding that the Fourteenth Amendment's Due Process Clause incorporates the First Amendment's Free Exercise Clause).

86. 494 U.S. 872 (1990).

87. The Court's justification for its decision was that a higher standard of scrutiny for general laws would have an impact on religious expression and

> would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service . . . to the payment of taxes . . . to health and safety regulation such as manslaughter and child neglect laws . . . . The First Amendment's protection of religious liberty does not require this.

Id. at 888–89 (citations omitted).

88. *See id.* at 878 ("It is a permissible reading of the text . . . to say that if prohibiting the exercise of religion . . . is not the object [of the state policy] . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."); *see also id.* at 885 ("We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [strict scrutiny] test inapplicable to such challenges.").

89. "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the

"regardless of the state of the legislative record," the Court concluded that the RFRA was unconstitutional because it created a strict scrutiny standard where the Supreme Court had previously concluded that little or no scrutiny was appropriate.[90] The Court described this second problem as even "more serious" than the first problem, suggesting that no amount of legislative hearings could give Congress the power to "attempt a substantive change in constitutional protections."[91] Thus, the Court concluded that the RFRA was "substantive" rather than "enforcement" legislation.[92] Because laws of general applicability simply did not create free exercise problems, the Court concluded that the RFRA fell on the substantive side of the enforcement/substantive distinction.[93]

In its most recent state sovereign immunity cases involving non–civil rights issues, the Supreme Court has continued to emphasize that Congress does not have the right to enact enforcement legislation for nonfundamental rights. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[94] the Court concluded that the property-based due process rights alleged to justify the Trademark Remedy Clarification Act did not exist, so that Congress had little or no enforcement power under section five.[95]

This third principle has rarely been used to strike down legislation designed to enforce the Equal Protection Clause but has been used several

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hearings mentions no episodes occurring in the past 40 years." City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

90. The Court concluded that the RFRA attempts "a substantive change in constitutional protections." *Id.* at 532.

91. *Id.*

92. *See id.*

93. But the Court has arguably softened its statement from *Smith* as to which type of problem was "more serious." In *Kimel*, the Court emphasized that it should examine the legislative record to understand the justifications for Congress's actions even if Congress is attempting to "prohibit[] very little conduct likely to be held unconstitutional." Kimel v. Florida Bd. of Regents, Nos. 98-791, 98-796, 2000 WL 14165, at *16 (U.S. Jan. 11, 2000). It called the problem of Congress seeking to prohibit constitutional conduct as "significant" but did not use *Smith*'s "more serious" language. *Id.*

94. 119 S. Ct. 2219 (1999).

95. *See id.* at 2225 ("Unsurprisingly, petitioner points to no decision of this Court (or of any other court, for that matter) recognizing a property right in freedom from a competitor's false advertising about its own products."). The legal issue in *College Savings Bank* was whether the federal courts had jurisdiction to consider a lawsuit against the state pursuant to the Trademark Remedy Clarification Act. *See id.* at 2222. College Savings Bank had brought suit against the state under that act, and the lower courts had concluded that they did not have subject matter jurisdiction because the statute did not constitutionally abrogate state sovereign immunity. *See id.* at 2223. The Supreme Court affirmed, concluding that the Trademark Remedy Clarification Act could not be justified under section five. *See id.* It did not consider whether the lawsuit could be maintained as a suit solely for injunctive relief under *Ex Parte Young*. The question of the continued vitality of an *Ex Parte Young* theory is complicated and beyond the scope of this Article. *See supra* note 79.

times to strike down legislation designed to enforce the Due Process Clause. Why does this contrast occur?

An easy answer is that Congress has simply done a better procedural job justifying civil rights legislation than other legislation.[96] It has held hearings and crafted legislation to respond to an important social problem in the civil rights area. Given the history of the Fourteenth Amendment, this deference would appear to be particularly appropriate when Congress has sought to protect African Americans from racial discrimination. As discussed above, the framers of the Fourteenth Amendment envisioned Congress as having a more important role in this context than the judiciary or the states. The Court's decisions have been faithful to that historical understanding.

That explanation, however, is not satisfactory, because *City of Boerne* states clearly that the RFRA's "most serious shortcoming," which was a problem "regardless of the state of the legislative record," was that it made a "substantive change in constitutional protections."[97] The difference between the due process and equal protection cases actually arises from the fact that little or no constitutional protection exists in the due process area for nonfundamental rights. Because little or no constitutional protection exists, Congress has no enforcement authority to enact legislation of any sort to enforce nonfundamental due process rights. It does not matter whether Congress creates a legislative record, because it does not have legislative power in that field to enact legislation that regulates the states and provides for a private damages remedy. Thus, Congress did not have the power to enact the RFRA, because the Supreme Court had previously concluded in *Smith* that the judiciary had no proper role in examining the validity of general laws that had a disparate impact on religious practice. Such laws need not be evaluated under a rational basis test, a balancing test, or a strict scrutiny test.[98] Similarly, in *College Savings Bank*, Congress had no enforcement authority at all to abrogate state immunity under the Trademark Rem-

96. *See, e.g.*, Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2207. (1999) ("Unlike the undisputed record of racial discrimination confronting Congress in the voting rights cases, Congress came up with little evidence of infringing conduct on the part of the States." (citation omitted)).

97. *City of Boerne*, 521 U.S. at 531–32.

98. *See* Employment Division v. Smith, 494 U.S. 872, 890 (1990).

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Id.

edy Clarification Act, because there is no "property right in freedom from a competitor's false advertising about its own products."[99]

Other commentators might disagree with my characterization of substantive due process as providing strict scrutiny for fundamental rights and little or no scrutiny for nonfundamental rights. They would argue that the rational basis test always applies under the Due Process Clause for nonfundamental rights, which could give rise to Congress's enforcement power under section five.[100] Yet, even Professor Scott Bice, who has written the two most significant articles on the importance of rational basis review in constitutional law, acknowledges that the view that the Due Process Clause always allows for at least rational basis review "adds little if any substantive content to the due process clauses."[101] Consistent with Professor Bice's observation, I have not been able to find any substantive due process cases in which the Court has struck down state legislation under rational basis scrutiny. In fact, *Williamson v. Lee Optical*[102] is one of the last cases to invoke explicitly a rational basis standard in the due process area. In upholding a state statute that greatly harmed the business interests of opticians and optometrists, while benefiting ophthalmologists, the Court said that "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[103] The rational basis test under the Due Process Clause might therefore be described as "de facto no scrutiny at all."[104]

The problem of a lack of substantive enforcement power rarely occurs, however, when Congress seeks to enforce the Equal Protection Clause. For suspect classes, it is obvious that Congress has significant enforcement power, because the history of the Fourteenth Amendment amply demonstrates that the framers intended Congress to enact legislation to protect

99. *College Sav. Bank*, 119 S. Ct. at 2225.

100. *See, e.g.*, Scott H. Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 2–3 (1980) [hereinafter Bice, *Rationality Analysis*] ("Courts often require that legislation must be rationally related to a legitimate governmental interest. This 'rational basis test' is commonly said to be the minimum standard of judicial review—the standard that all legislation must meet to survive constitutional attack, whether challenged under the due process clause or the equal protection clause." (citations omitted)); Scott H. Bice, *Standards of Judicial Review Under the Equal Protection and Due Process Clauses*, 50 S. CAL. L. REV. 689, 707 (1977) [hereinafter Bice, *Standards of Judicial Review*] ("The central issue in substantive due process is determining what counts as an 'adequate justification.' The minimum protection view is that a deprivation is justified so long as it is accomplished pursuant to a validly enacted law.").

101. Bice, *Standards of Judicial Review*, *supra* note 100, at 707 n.86.

102. 348 U.S. 483 (1955).

103. *Id.* at 488.

104. This phrase was suggested by my colleague Professor Alan Michaels in a conversation with me about this Article.

the interests of those groups. Thus, when Congress has sought to enforce the Equal Protection Clause to protect the equality interests of African Americans, no court has questioned whether it has that underlying enforcement power.

Further, Congress even has residual enforcement power for nonsuspect classes, because the Equal Protection Clause provides meaningful protection to all classes of persons. The Court's history of decisions for nonsuspect classes reveals that meaningful constitutional rights exist in the equal protection context even for nonsuspect groups. For instance, in *Massachusetts Board of Retirement v. Murgia*,[105] the Court concluded that the plaintiffs could make a claim of age-based discrimination under the Equal Protection Clause. Although they lost on the merits, the Court did have to consider thoughtfully whether their claim of age discrimination was valid. Similarly, in *Romer v. Evans*,[106] the plaintiffs had standing to make a successful equal protection claim even though the Court has failed to accord suspect class status to gay men and lesbians. Finally, the disabled plaintiffs in *City of Cleburne v. Cleburne Living Center, Inc.*[107] had the right to go forward with their equal protection claim even though the Court accorded them nonsuspect class status. Not only did they go forward, but the Court concluded that they should prevail under that standard. Thus, the nonsuspect class label does not deprive a group of the right to equal protection of the laws. It merely affects the framework that the Court uses in assessing its claim of discrimination under section one.

There is even a textual reason for the rational basis standard to be more meaningful in the context of the Equal Protection Clause than the Due Process Clause. The Equal Protection Clause provides nondiscrimination protection to all "persons." Whereas the Court has had to determine for itself what categories of claims deserve protection under an illusory "due process" standard with little or no textual guidance,[108] the language of the Equal Protection Clause suggests that all persons are entitled to make claims involving their right to equal protection. Congress therefore always has a legitimate textual basis for invoking the Equal Protection Clause irrespective of whether a group is entitled to "suspect class" treatment. It is impossible to say that any federal antidiscrimination legislative measure is not seeking

105. 427 U.S. 307 (1976).
106. 517 U.S. 620 (1996).
107. 473 U.S. 432 (1985).
108. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." (citation omitted)).

to enforce the Fourteenth Amendment so long as Congress has created a legitimate record that antidiscrimination legislation is necessary.

The Court's recent decision in *Kimel* is not to the contrary. The Court recognized the breadth of Congress's power under section five of the Fourteenth Amendment when it stated:

> Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress' power "to enforce" the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.[109]

It then engaged in a serious examination of whether the ADEA's prohibition against discrimination exceeded this latitude to prohibit a "somewhat broader swath of conduct" than expressly prohibited by the Fourteenth Amendment. The broad reach of the ADEA, coupled with limited Congressional findings of discrimination by state actors, however, led the Court to conclude that "Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem."[110]

Nonetheless, the *Kimel* case does reflect the first time that the Court has concluded that Congress exceeded its authority when seeking to enforce an equal protection guarantee. But it drew that conclusion after taking Congress's powers more seriously than it has in recent cases involving the Due Process Clause. For example, in *Florida Prepaid*, a case involving a property interest protected under the Due Process Clause, the Court stated "petitioner points to no decision of this Court (or of any other court, for that matter) recognizing a property right in freedom from a competitor's false advertising about its own products."[111] Finding that no right even existed, it did not ask the "broader swath of conduct" question in *Florida Prepaid* that it later asked in *Kimel*.[112] Thus, *Kimel* does support the argument that the Court will offer more deference to Congress when it seeks to enforce the Equal Protection

109. Kimel v. Florida Bd. of Regents, Nos. 98-791, 98-796, 2000 WL 14165, at *12 (U.S. Jan. 11, 2000).

110. *Id.* at *16.

111. College Sav. Bank v. Florida Prepaid Postsecondary Expense Bd., 119 S. Ct. 2219, 2225 (1999).

112. *See id.*

> Finding that there is no deprivation of property at issue here, we need not pursue the follow-on question that *City of Boerne* would otherwise require us to resolve: whether the prophylactic measure taken under purported authority of § 5 (viz., prohibition of States' sovereign-immunity claims, which are not in themselves a violation of the Fourteenth Amendment) was genuinely necessary to prevent violation of the Fourteenth Amendment.

Id.

Clause than when it seeks to enforce the Due Process Clause, even if that equal protection interest only garners a low-level rational basis test under section one.

The fact that the enforcement threshold is not a significant hurdle for legislation designed to protect a group's equality interests, however, does not mean that section five gives Congress a blank check in the equal protection context to abrogate state sovereign immunity. It must still satisfy principle number four.

4. Violation of Another Constitutional Right

Under the fourth principle, legislation enacted pursuant to section five must not violate another constitutional right, because it would then fail the "appropriate legislation" requirement under section five.

This principle emerged in *Katzenbach v. Morgan*.[113] The respondents argued that the Voting Rights Act was unconstitutional under section five, because it

> works an invidious discrimination in violation of the Fifth Amendment by prohibiting the enforcement of the English literacy requirement only for those educated in American-flag schools . . . in which the language of instruction was other than English, and not for those educated in schools beyond the territorial limits of the United States in which the language of instruction was also other than English.[114]

In other words, the respondents argued that the Voting Rights Act violated another provision of the Constitution—the Fifth Amendment. The Supreme Court acknowledged that it would be inappropriate for section five legislation to violate another provision of the Constitution but concluded that no such violation had occurred in this case, because the statute in question did not directly harm anyone. It did not restrict or deny the franchise. It was merely a "reform measure aimed at eliminating an existing barrier to the exercise of the franchise."[115]

Although the Supreme Court's explanation of why it rejected this argument was not extensive, the fourth principle emerges from that discussion. The Court stated that courts do have a responsibility to make sure that legislation is "appropriate" by being consistent with the "letter and the spirit of the [C]onstitution."[116] The legislation at issue was appropriate,

113. 384 U.S. 641 (1966).
114. *Id.* at 656.
115. *Id.* at 657.
116. *Id.* at 651 (quoting U.S. CONST. amend. XIV, § 5, and McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

despite the fact that it drew distinctions between groups, because those distinctions did not themselves violate the equal protection guarantees of the Fifth Amendment's Due Process Clause.

The fourth principle has not been paramount in previous section five cases. But, as I argue below, it may be pivotal in determining whether Congress has exceeded its authority in enacting ADA Title II, because the statute provides some "special protection rules," like the reasonable accommodation requirement, that arguably have some impact on the rights of others. The application of the fourth principle is also difficult to assess, because it is not easy to determine whether Congress, in fact, is violating a constitutional right outside of the Fourteenth Amendment when it seeks to enforce the Fourteenth Amendment. A framework for making that determination is discussed in Part II.

II. THE FOURTH PRINCIPLE RE-EXAMINED: VIOLATIONS OF THE "LETTER OR SPIRIT OF THE CONSTITUTION"

A. Introduction

In theory, Congress could violate nearly any provision contained in the Bill of Rights—it could restrict speech,[117] deprive an individual of his or her right to bear arms,[118] seize the property of an individual,[119] deprive a person of his or her right to a trial,[120] or impose excessive bail[121]—while seeking to protect the equality rights of certain groups in our society under section five. In practice, all the cases challenging Congress's power to enact civil rights legislation have questioned whether that legislation violated the equal protection guarantee found in the Fifth Amendment's Due Process Clause.[122]

Whether a statute violates the Fifth Amendment's equal protection guarantee is a difficult question to answer because of the confusion emanating from the Court's Fifth Amendment and affirmative action jurisprudence. Until the 1950s, the Supreme Court did not consider the Fifth Amendment even to impose an equal protection requirement and certainly did not

117. *See* U.S. CONST. amend. I.
118. *See* U.S. CONST. amend. II.
119. *See* U.S. CONST. amend. IV.
120. *See* U.S. CONST. amend. VI.
121. *See* U.S. CONST. amend. VIII.
122. *See, e.g.*, Hedgepeth v. Tennessee, 33 F. Supp. 2d 668 (W.D. Tenn. 1998); Garrett v. Board of Trustees, 989 F. Supp. 1409 (N.D. Ala. 1998); Pierce v. King, 918 F. Supp. 932 (E.D. N.C. 1996), *aff'd*, 131 F.3d 136 (4th Cir. 1997), *vacated on other grounds*, 119 S. Ct. 33 (1998) (mem.). For further discussion, see *infra* Part III.A.

understand it to impose a standard that was identical to the standard found in section one of the Fourteenth Amendment. The text of these clauses supports this view. The Fifth Amendment does not reference equal protection at all; it says that "No person shall be . . . deprived of life, liberty, or property, without due process of law."[123] Section one of the Fourteenth Amendment, by contrast, states that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[124]

As recently as 1943, the Court said that "[u]nlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress."[125] In the first Japanese curfew case, the Court only required the federal government to defend its curfew under rational basis scrutiny.[126] Even in the infamous *Korematsu*[127] case, in which the Court purported to invoke "the most rigid scrutiny," the Court's holding and reference to the previous Japanese curfew case suggest that it was not applying a rigorous scrutiny at all.[128]

In the 1950s, however, the Court began to raise the level of scrutiny for racial classifications under the Fifth Amendment's equal protection guarantee to equal the standards embodied in section one of the Fourteenth Amendment. These standards became explicitly equivalent in 1995 when the Court stated in *Adarand Constructors, Inc. v. Pena*[129] that "we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[130]

Whether the Fifth Amendment's equal protection guarantee has been violated has thus come to depend largely upon the meaning of section one's Equal Protection Clause. Because the Supreme Court did not render the decision in *Adarand* until 1995, and fewer cases are filed against Congress for violating the Fifth Amendment's equal protection guarantee than are filed against the fifty states for violating the Fourteenth Amendment's equal protection guarantee, most of the cases that can provide guidance on the meaning of the Fifth Amendment's equal protection guarantee will be Fourteenth Amendment cases.

These equality cases, however, are only relevant in this context for determining when Congress has violated the "appropriate legislation"

123. U.S. CONST. amend. V.
124. U.S. CONST. amend. XIV, § 1.
125. Detroit Bank v. United States, 317 U.S. 329, 337 (1943).
126. *See* Hirabayashi v. United States, 320 U.S. 81, 102 (1943).
127. Korematsu v. United States, 323 U.S. 214 (1944).
128. *See id.* at 216–19.
129. 515 U.S. 200 (1995).
130. *Id.* at 227.

requirement by exceeding its *maximum* authority under section five through the creation of an invidious classification that itself violates the Fifth Amendment's equal protection guarantee. An example might help clarify how the equality jurisprudence *should* and *should not* enter the section five appropriate legislation analysis.

For example, let us assume that Congress passes legislation that requires 10 percent of the contractors on state projects to be "minority-owned" businesses.[131] Further, let us assume that this legislation provides a private right of action for damages for qualified minority-owned businesses if they are denied a state contract when the state has not met its 10 percent requirement. Under the circumstances, let us suppose that a qualified minority-owned business, which was not hired to perform a contract, sues a state for failing to comply with this requirement. The state defends this action by arguing that Congress's legislation exceeded its enforcement authority under section five, because the legislation violated the constitutional rights of nonprotected class members under the Fifth Amendment's equal protection guarantee. Assuming the legislation met the first two principles, the Court's equality jurisprudence *would* be relevant for determining whether Congress had exceeded its enforcement authority by creating legislation that, itself, *violated* another provision of the Constitution such as the Fifth Amendment's equal protection guarantee. The Supreme Court has held that affirmative action can only be required if very stringent criteria are met; it is unlikely that this hypothetical legislation would meet those requirements.[132]

By contrast, let us assume that Congress enacts race discrimination legislation that permits proof of disproportionate impact as a theory for state liability for damages, rather than proof of intentional discrimination. An

131. *See, e.g., id.* (invalidating a federal law that required a subcontracting clause that favored certain minority groups); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 477 (1989) (invalidating a city ordinance that required construction contracts to subcontract at least 30 percent of the dollar amount of each contract to one or more "[m]inority [b]usiness [e]nterprises").

132. *See, e.g., Adarand*, 515 U.S. at 235 (concluding that a minority subcontracting preference must satisfy strict scrutiny); *Croson*, 488 U.S. at 498–500 (concluding that the city failed to demonstrate a compelling governmental interest to justify the 30 percent minority requirement). Other commentators have argued that the Supreme Court has improperly interpreted the Fourteenth Amendment to invalidate such affirmative action plans. *See, e.g.*, Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 789–98 (1985); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2413 (1994); *cf.* T. Alexander Aleinikoff, *Re-Reading Justice Harlan's Dissent in* Plessy v. Ferguson*: Freedom, Antiracism, and Citizenship*, 1992 U. ILL. L. REV. 961, 963 (suggesting that Justice Harlan supported affirmative action despite his infamous statement that the Constitution must be "color-blind"). Although these commentators' arguments may stem from a correct historical and normative reading of the Fourteenth Amendment, for the purposes of this Article, I am going to assume the validity of the affirmative action jurisprudence.

African American plaintiff sues the state for using a nonvalid[133] testing instrument that disproportionately excludes damages for African Americans from a particular job category. The state defends this lawsuit by saying that Congress exceeded its enforcement authority under section five in enacting the race discrimination legislation. Although the Supreme Court has held that evidence of intent must be established to demonstrate a violation of section one of the Fourteenth Amendment,[134] I would argue that this legislation is consistent with the fourth principle.[135] It complies with the fourth principle because it is not unconstitutional under the Fifth Amendment for Congress to create a disparate impact theory. The disparate impact theory, itself, does not violate the constitutional rights of others. Thus, it complies with the fourth principle.[136]

The important question that arises then is: When might legislation enacted by Congress to enforce the Equal Protection Clause violate the equality rights of others? That problem is most likely to arise in the affirmative action context in which special protection rights for one group arguably collide with the equality rights of another group. Nonetheless, it is wrong to conclude that all special protection legislation enacted pursuant to section five is unconstitutional. It is possible for special protection legislation not to infringe the equality interests of others.

B. History of the Equal Protection Clause

Although some commentators might argue that any legislation that deviates from the pure color-blind or antidifferentiation framework by granting special protection or antisubordination rights violates the guarantee to

133. *See, e.g.*, Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k) (1994).

134. *See* Washington v. Davis, 426 U.S. 229, 240 (1976).

135. To pass constitutional muster, the legislation would also have to be consistent with the other three principles. One would want to know whether Congress held sufficient hearings to demonstrate that nonintentional discrimination by state actors was a problem before enacting that theory of liability. As I have argued above, Congress typically conducts ample legislative hearings before enacting civil rights legislation. The disparate impact theory contained within Title VII appears to conform to that pattern. *See* Reynolds v. Alabama Dep't of Transp., 4 F. Supp. 2d 1092, 1110 (M.D. Ala. 1998) (concluding that "Title VII's legislative history reflects that the premise of the act was societally widespread and longstanding intentional discrimination against African-Americans, the deep-rooted effects of which could not be adequately addressed merely by a ban on intentional discrimination").

136. Supreme Court precedent under section five of the Fourteenth Amendment and section two of the Fifteenth Amendment is consistent with this assessment. *See* City of Rome v. United States, 446 U.S. 156, 177 (1980) ("In the present case, we hold that the [Voting Rights] Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting.").

equal protection,[137] I argue below that such a position is inconsistent with the history and case law under the Equal Protection Clause.

The history of the Fourteenth Amendment suggests that the ratifying Congress of 1868 was well aware of the debate between the antidifferentiation and antisubordination[138] perspectives. As we will see below, it endorsed both principles but particularly endorsed the antisubordination principle as reflected in its discussions of the Fourteenth Amendment and the contemporaneous special protection legislation that it considered appropriate and necessary for African Americans.

As Professor Eric Schnapper has persuasively argued in his careful historical examination of the Fourteenth Amendment, the ratifying Congress considered the basic purpose of this amendment to be "the amelioration of the condition of the freedmen."[139] Similarly, in enacting legislative relief measures at the same time, Congress passed some relief measures that were only available to African Americans and passed other legislation that would provide relief both to whites and to African Americans. The debate between the antisubordination and antidifferentiation theories was alive in the halls of Congress, as evidenced by President Johnson's veto of special treatment legislation on the ground that it permitted Congress to prefer "a portion of the people, discriminating against all others."[140] Congress rejected those arguments and overrode the veto.[141]

All the special protection legislation passed by the 1865 Congress involved situations in which African Americans were not awarded preferences in a way that unduly burdened identifiable whites. The various statutes that accorded special protection to African Americans gave them provisions, clothing, and fuel, as well as the opportunity to lease or purchase

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137. The argument that the Fourteenth Amendment does not permit affirmative action is primarily a textual argument, not a historical argument, based on the language of section one but ignoring the language of section five. *See, e.g.*, Metro Broad., Inc. v. Federal Communications Comm'n, 497 U.S. 547, 603–04 (1990) (O'Connor, J., dissenting) (arguing for the color-blind principle from the text and case law under the Fourteenth Amendment, but not discussing the ratification history of the Fourteenth Amendment), *overruled by Adarand*, 515 U.S. at 200. Because the predominant and better view of constitutional interpretation is that it should rely on more than mere textual arguments, I have rejected that alternative for the purposes of this Article. As Chief Justice Marshall said many years ago, "it is *a constitution* we are expounding." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819). A pure textual approach may be a persuasive argument for interpreting legislation, but it is not an appropriate argument for interpreting a Constitution.

138. For definitions of these perspectives, see *supra* notes 37 and 38 and accompanying text.

139. Schnapper, *supra* note 132, at 785 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement by Rep. Stevens)).

140. *Id.* at 775 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 3840 (1866) (statement by Sen. Saulsbury)).

141. *See id.* at 775.

certain land.[142] Because of their history of slavery, African Americans were considered entitled to these programs in order to ameliorate their prior condition. Nonetheless, when a severe crop failure in the South caused widespread famine, Congress passed relief legislation that was available to individuals of all races. Congress therefore continually wrestled with the limits of the antisubordination principle. It struggled with determining at what point the special protection rights that were available to African Americans, if not also extended to whites, would result in whites' being treated unfairly.

How the Congress of 1868 would react to the examples of reverse discrimination that the Supreme Court has handled in the last couple of decades[143] is hard to determine from these examples of legislation passed by the 1868 Congress. Nonetheless, it is clear that special protection benefits that did not unduly burden the interests of whites were considered permissible by the 1868 Congress. Because not all forms of special protection result in harm or disadvantage to others, we can readily conclude that the 1868 Congress would have favored some forms of special protection legislation appropriate for groups with a genuine need for assistance. Based on the statements and legislation from the 1868 Congress, it is erroneous to describe the 1868 Congress as having a pure antidifferentiation mindset. The 1868 Congress did not anticipate the Fourteenth Amendment's becoming a tool to strike down the special protection legislation that it considered desirable for African Americans.

Although we can generally draw the antidifferentiation and antisubordination principles from the history of the Fourteenth Amendment, we cannot draw a precise framework for accommodating those principles from history alone. The Supreme Court's equal protection jurisprudence—which I discuss next—offers important insight into how these principles can coexist.[144]

C. Equal Protection Jurisprudence

1. Race and Gender Discrimination

The scope of protection found in the Equal Protection Clause is not easy to resolve, because two lines of Supreme Court precedent sometimes

142. *See id.* at 760.

143. *See infra* Part II.C (discussing reverse discrimination cases).

144. Although I do not agree on a normative basis that the Supreme Court's delineation of the appropriate standard in Fourteenth Amendment cases is the best possible framework, *see generally* Colker, *supra* note 37, it is not the purpose of this Article to challenge that framework so long as it is a plausible interpretation of the Fourteenth Amendment's text and history.

conflict with each other. First, the Court has carved out levels of scrutiny under an antisubordination model, reflecting the differing histories of discrimination that certain subgroups in our society have experienced.[145] Next, the court has recognized an antidifferentiation model of equality under which discrimination against whites is considered to be as problematic as discrimination against African Americans.[146] These two lines of precedent can generally be reconciled to mean that the Court recognizes that both antidifferentiation and antisubordination models can cohabit under the Equal Protection Clause so long as special protection legislation does not unduly burden the interests of others. It is misguided to argue from this precedent that special protection legislation can never survive an equal protection challenge under the Fourteenth Amendment.

The development of the suspect class rubric reflects the antisubordination perspective. This perspective can be readily found in the well-known footnote four in which Justice Stone, writing for the majority in *United States v. Carolene Products*,[147] stated that a more stringent standard of review might be appropriate in certain cases in which "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[148] The early strict scrutiny cases involved African American[149] or Asian American[150] plaintiffs who faced subordinating treatment.[151] Although the most famous of these cases—*Brown v. Board of Education*—is well-known for its antidifferentiation principle that "[s]eparate educational facilities are inherently unequal,"[152] the case was also embedded

145. *See supra* note 37 and accompanying text for a definition of the antisubordination perspective.

146. *See supra* note 38 and accompanying text for a definition of the antidifferentiation perspective.

147. 304 U.S. 144 (1938).

148. *Id.* at 152–53 n.4.

149. *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443–44 (1968) (holding that racially segregated housing is unconstitutional); Loving v. Virginia, 388 U.S. 1, 2 (1967) (holding that a statute prohibiting interracial marriage is unconstitutional); Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (holding that racially segregated schools are unconstitutional).

150. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (holding that an order excluding U.S. citizens of Japanese ancestry from certain militarily significant areas during World War II was constitutional).

151. *See, e.g., id.* at 216 ("It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.").

152. *Brown*, 347 U.S. at 495. Another equally famous phrase used to support the antidifferentiation perspective is Justice Harlan's statement in dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), that "[o]ur Constitution is color-blind." Read in context, however, that phrase also supports an antisubordination perspective. Justice Harlan, in fact, said: "But in

in a strong concern about the "feeling of inferiority"[153] that had been inculcated in African American children through racial segregation. The racially segregating policies at issue in *Brown* equally deprived whites and African Americans of an integrated education, yet the Supreme Court never contemplated how this breach of the equality principle harmed whites. The focus on the harm to African Americans was consistent with the antisubordination thesis that underlay the Court's early development of the strict scrutiny framework in section one cases.[154]

When the Supreme Court developed heightened scrutiny in the gender context, it continued to employ the antisubordination framework. It justified the development of heightened scrutiny through reference to the history of discrimination against women in our society. The first case in which the Supreme Court explicitly invoked heightened scrutiny for a gender classification involved a claim brought by a married couple who challenged a gender-specific rule in the armed forces.[155] A plurality of the Court applied heightened scrutiny and explained:

> [T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre–Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.[156]

The Court soon applied a heightened scrutiny standard to gender discrimination cases brought by male plaintiffs.[157] Only Justice Rehnquist paused to

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view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." For further discussion, see generally Aleinikoff, *supra* note 132.

153. *Brown*, 347 U.S. at 494.

154. For further discussion of the Court's development of its equal protection jurisprudence, see Colker, *supra* note 37, at 1016–28.

155. *See* Frontiero v. Richardson, 411 U.S. 677 (1973).

156. *Id.* at 685 (invalidating an armed services' rule that provided that married women could receive an extra stipend to support their families only if they could establish their husbands' financial dependence upon them). Because this case was brought against the federal government, it technically derived from the Fifth Amendment's Due Process Clause, which has been interpreted to include an equal protection principle comparable to the one found in section one of the Fourteenth Amendment. In *Frontiero*, the Court applied the framework developed in previous section one cases even though it noted that this case was brought under the Due Process Clause of the Fifth Amendment. *See id.* at 679.

157. *See* Craig v. Boren, 429 U.S. 190, 192 (1976) (granting the relief sought by a male challenging an Oklahoma statute that prohibited the sale of 3.2 percent beer to males under the age of 21 and to females under the age of 18); Kahn v. Shevin, 416 U.S. 351, 352 (1974) (denying a widower's challenge to a state property tax exemption that was available only to widows, blind persons, or totally and permanently disabled persons). The formulation of heightened scrutiny is

ask whether heightened scrutiny should apply to a group without a history of discrimination.[158]

This relatively noncontroversial move from having heightened scrutiny apply only to cases involving women to having it apply to cases involving men was possible because these cases did *not* involve affirmative action. Whether men could purchase beer[159] or take advantage of property tax relief[160] did not directly affect the rights or interests of women. Because no conflict existed between the antidifferentiation and antisubordination approaches in these cases, the Court could embrace both perspectives simultaneously.

California Federal Savings & Loan Ass'n v. Guerra[161] best reflected the possible cohabitation of antidifferentiation and antisubordination principles. It questioned whether the Pregnancy Discrimination Act (PDA) preempted "a state statute that requires employers to provide leave and reinstatement to employees disabled by pregnancy" but not to employees suffering from other disabilities.[162]

The language of the PDA supports an antidifferentiation model. It states in relevant part that "women affected by pregnancy, childbirth, or related medical conditions shall be treated *the same* for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."[163] The Supreme Court, however, looked beyond the language to conclude that the purpose of the PDA was to create a "floor beneath which pregnancy disability benefits may not drop—[rather than] a ceiling above which they may not rise."[164] Viewed through this lens, the Court found no conflict between California's preferential treatment of pregnancy and the PDA's antidiscrimination principle. While the Court recognized that preferential

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not identical in these cases but the nuances of the formulation are not relevant to the thesis of this Article. For further discussion of those nuances, see Colker, *supra* note 37, at 1016–28.

158. *See Craig*, 429 U.S. at 219–20 (Rehnquist, J., dissenting).

> [B]efore today, no decision of this Court has applied an elevated level of scrutiny to invalidate a statutory discrimination harmful to males, except where the statute impaired an important personal interest protected by the Constitution. There being no such interest here, and there being no plausible argument that this is a discrimination against females, the Court's reliance on our previous sex-discrimination cases is ill-founded. It treats gender classification as a talisman which—without regard to the rights involved or the persons affected—calls into effect a heavier burden of judicial review.

Id. (footnotes omitted).

159. *See id.*

160. *See Kahn*, 416 U.S. at 355.

161. 479 U.S. 272 (1987).

162. *See id.* at 274–75.

163. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1994) (emphasis added).

164. *Guerra*, 479 U.S. at 285 (quoting California Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390, 396 (9th Cir. 1985)).

treatment is subject to limitations under the PDA,[165] it concluded that such limitations were not violated in this case.

The Supreme Court decided *Guerra* at the beginning of its excursion into affirmative action cases, yet only three Justices dissented from its holding. I would explain that outcome by noting that the legislation at issue did not directly burden any identifiable group of men. The plaintiff was a business entity that did not wish to comply with the PDA. And as the Court noted, the state statute did not prevent an employer from providing disability benefits to all men and women who suffer from a disabling condition that prevents them from working.[166] Because pregnancy is a unique condition, the case did not pit women against an identically situated group of men. Thus, the Court could comfortably embrace an antisubordination perspective without concluding that the challenged action had unduly burdened men. In such situations, the Court has been comfortable with an antisubordination perspective.

The antidifferentiation and antisubordination strands of jurisprudence continue to exist in the Court's more recent decisions. Each time a group has asked to be categorized as a suspect class, the Court has subjected the group to a *Carolene Products* historical-discrimination test.[167] And it has also continued to articulate an antidifferentiation perspective on equal treatment.[168]

Tension between these two frameworks has occurred in the affirmative action area, particularly in cases in which the Court has perceived that whites have been disadvantaged by programs designed to assist African

165. *See id.* at 285 n. 17; *see also id.* at 294–95 (Stevens, J., concurring).

166. *See id.* at 291.

167. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (refusing to apply heightened scrutiny to age-based classifications, noting that "even old age does not define a 'discrete and insular' group in need of 'extraordinary protection from the majoritarian political process'" (quoting School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973), and United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938))). More recently, in *Romer v. Evans*, 517 U.S. 620, 631 (1996), the Supreme Court skirted the issue of whether gays and lesbians are a suspect class but did recite the principle that a court will employ heightened scrutiny when evaluating the constitutionality of a law that "targets a suspect class." Even Justice Scalia's blistering dissent suggests that the *Carolene Products* formulation for heightened scrutiny is still appropriate, notwithstanding his claims that:

> It is also nothing short of preposterous to call "politically unpopular" a group which enjoys enormous influence in American media and politics, and which, as the trial court here noted, though composing no more than 4 percent of the population had the support of 46 percent of the voters on Amendment 2 . . . .

Id. at 652 (Scalia, J., dissenting) (citation omitted). Although members of the Court may differ on whether they believe a group has been subjected to historical discrimination and lacks political power, they all seem to agree that those are important criteria for suspect class treatment.

168. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996).

Americans. In that context, the Court has sometimes struck down affirmative action programs as causing too much injury to white plaintiffs.[169]

The Supreme Court has justified these decisions by saying that the affirmative action program in question could not be supported by the strict scrutiny test that asks "whether the [program in question] is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored."[170] In practical terms, the Court closely examined the alleged harm to "innocent" parties to determine whether the affirmative action plan was unconstitutional.[171]

Wygant v. Jackson Board of Education[172] reflects a turning point in the Court's affirmative action cases. *Wygant* involved the constitutionality of a preferential protection against layoffs for some African American employees. In prior cases, the Court had found that affirmative action plans could be constitutional even if some "sharing of the burden" on "innocent parties" was necessary.[173] In *Wygant*, however, the Court made it clear that the burden on innocent parties is an important part of the assessment of whether an affirmative action plan is sufficiently narrowly tailored to be compatible with the Equal Protection Clause. In striking down the preferential policy, the Court made it clear that the burden on innocent parties was a crucial part of its calculation:

> While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive . . . . For th[is] reason[], the Board's selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause.[174]

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169. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (federal contracts); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (city contracts); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (employment); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (higher education).

170. *Wygant*, 476 U.S. at 274.

171. While I do not agree with the Court's "innocent parties" perspective, I do believe that my description of the holdings in these cases is accurate. My purpose in this part is to offer an accurate description, not to suggest a prescription for how the Court should consider these cases.

172. 476 U.S. 267 (1986).

173. *See* Fullilove v. Klutznick, 448 U.S. 448, 484 (1980) (plurality opinion) ("It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible." (quoting Franks v. Bowman Transp. Co., 424 U.S. 747, 777 (1976))).

174. *Wygant*, 476 U.S. at 283–84 (footnotes omitted).

The *Wygant* decision did not rule out the possibility of preferential programs for African Americans, but it announced that in order to pass constitutional muster those programs must not unduly burden innocent parties. Subsequent cases in which the Supreme Court has ruled for white plaintiffs in reverse discrimination cases have protected the interests of such innocent parties and simultaneously continued to acknowledge the existence of an antisubordination perspective.[175] In *Croson*, for example, the Court suggested that the minority contractor preference could have been justified—despite its impact on white contractors—if the city had used a more individualized approach to determine if contractors benefiting from the program had "suffered from the effects of past discrimination by the city or prime contractors."[176] The Court also acknowledged the antisubordination justification for strict scrutiny—even in cases brought by whites—by noting that "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[177] Presumably, the reference to "stigmatic harm" was a reference to the harm directed towards African Americans, not whites, from affirmative action programs. Thus, even as the Court struck down programs designed to benefit African Americans, it did so under the rationale that the legislature was, in fact, misguided in thinking that it was benefiting African Americans. The Court insisted that it was benefiting African Americans in striking down programs enacted to benefit African Americans.

Thus, one can conclude from the law of race discrimination that the Court has grown increasingly hostile towards affirmative action programs that result in direct and distinct burdens on whites. But the Court has not gone so far as to base the law of equal protection solely on an anti-differentiation perspective. It has also not gone so far as to say that no burdens on whites are permissible under affirmative action programs.

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175. Only Justices Thomas and Scalia have rejected the antisubordination principle entirely. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring). Justice Thomas states:

> I [disagree] with the premise underlying [the dissents]: that there is a racial paternalism exception to the principle of equal protection. I believe that there is a "moral [and] constitutional equivalence," *post*, at 243 (Stevens, J., dissenting), between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.

Id.

176. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 508 (1989).

177. *Id.* at 493.

2. Disability-Based Discrimination

The constitutional law of disability discrimination is not as rich as the law of race discrimination, but, as we will see below, it also reflects a recognition of both the antisubordination and the antidifferentiation frameworks. Thus, it is simply wrong as a factual matter to read the Supreme Court's decisions under the Equal Protection Clause to require a pure antidifferentiation approach.

The leading disability case under section one of the Fourteenth Amendment is *City of Cleburne v. Cleburne Living Center, Inc.*[178]—a case that directly raised the question of the constitutionality of a state entity's using a disability-based classification in a way that harmed the interests of individuals with mental retardation. The zoning regulations at issue permitted hospitals, sanitariums, nursing homes, or homes for convalescents or the aged to be operated in an area zoned as R-3 (an apartment house zoning standard[179]) but required homes "for the insane or feeble-minded or alcoholics or drug addicts" to receive a special use permit, which had to be renewed annually.[180] Not only did the city zoning regulations require a special use permit based on one's status as "insane or feeble-minded," but the city council voted three to one to deny a special use permit when a group home for individuals who are mentally retarded requested such a permit. Thus, the city had a per se discriminatory classification system, and the city council did not take steps to undo the discriminatory impact of its classification system.

The Supreme Court decided *City of Cleburne* in 1985, at a time when it had recently created a three-tiered classification scheme for race-, gender-, and age-based classifications.[181] A majority of the Court declined to adopt heightened scrutiny for individuals with mental retardation, but the Court's reasoning was very fractured, with two separate concurring opinions.

Against this backdrop of three levels of scrutiny, the majority chose to employ the lowest level of review—rational basis scrutiny—for individuals who are mentally retarded. The reason for this choice was that the majority

178. 473 U.S. 432 (1985).

179. *See id.* at 455 (Stevens, J., concurring).

180. *See id.* at 436 n.3.

181. As the majority opinion acknowledged in *City of Cleburne*, racial categories were "subjected to strict scrutiny and [would] be sustained only if they [were] suitably tailored to serve a compelling state interest." *Id.* at 440. Gender classifications, the majority acknowledged, were subjected to a "heightened standard of review" under which "[a] gender classification fails unless it is substantially related to a sufficiently important governmental interest." *Id.* at 440–41. Age classifications, by contrast, the majority recognized, were not subjected to heightened review because "individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement." *Id.* at 441.

considered it more likely that governmental entities would seek to pass legislation to enhance the position of individuals with mental retardation than that it would pass legislation to harm their position. It noted that Congress had recently passed the Rehabilitation Act, the Developmental Disabilities Assistance and Bill of Rights Act, and the Education of the Handicapped Act, and states had passed legislation that "acknowledges the special status of the mentally retarded by conferring certain rights upon them . . . ."[182] If the Court adopted heightened scrutiny, these special programs—because they created disability-specific classifications—would be subjected to the presumption that they were unconstitutional. The majority did not consider it appropriate for the judiciary to operate under such a presumption:

> Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.[183]

The majority therefore adopted rational basis scrutiny in order to give the states and the federal government the flexibility to pass legislation to assist individuals with mental retardation without having to meet the cumbersome standard of heightened scrutiny:

> To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. This standard, we believe, affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner.[184]

The majority was clearly aware of the way existing legislation at the federal level both assisted and, in some cases, disadvantaged individuals with mental retardation. And, as the majority specifically noted, this body of law included a federal regulation that exempted individuals with mental retardation from the requirements of a competitive examination when seeking governmental employment.[185] The majority opinion sanctioned these measures as consistent with its understanding of the Equal Protection Clause. The majority understood that heightened scrutiny would create a reverse discrimi-

182. *Id.* at 444.
183. *Id.* at 446.
184. *Id.*
185. *See id.* at 443–44.

nation problem, because special treatment would have to be justified under a heightened level of scrutiny.

Thus, it was one of the Court's leading antidifferentiation advocates—Justice White (joined by Justices Rehnquist, Stevens, Powell, and O'Connor)—who authored the majority opinion in *City of Cleburne*, paving the way for special treatment under the rubric of rational basis review while leaving intact the Court's recent case law deriding special treatment under the rubric of heightened scrutiny in the race and gender area. The opinion clearly envisioned special treatment for individuals with disabilities under rational basis review.

The leading antisubordination advocates on the Court—Justices Marshall, Brennan, and Blackmun—concurred separately, arguing for heightened scrutiny. Like the members of the majority, these Justices would also favor the constitutionality of special treatment for individuals with disabilities. But because they would not perceive the invocation of heightened scrutiny as constituting the death knell for special treatment, they could call for heightened scrutiny without being concerned about some problematic collateral consequences. In fact, they could have perceived the creation of heightened scrutiny for a group that would most likely receive statutory preferential treatment as an aid in the development of the antisubordination perspective, because it would have forced the Court to develop a coherent framework for approving preferential treatment.[186] In any event, it is clear that there were at least eight votes consistent with special treatment for individuals with disabilities in the *City of Cleburne* decision.[187]

186. By contrast, most of the race and gender cases dealing with preferential treatment have struck down such measures, leaving little insight into what kinds of preferential measures might be sustainable.

187. The final opinion in the case—authored by Justice Stevens and Chief Justice Burger—straddled the line between the antisubordination and the antidifferentiation perspectives. The Justices argued that there should be a single, rather than tiered, standard of equal protection review. *See City of Cleburne*, 473 U.S. at 452 (Stevens, J., concurring). This moderate view recognized the antisubordination observation that the "Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a 'tradition of disfavor. . . .'" *Id.* at 453 n.6 (Stevens, J., concurring). But it also "will result in the virtually automatic invalidation of racial classifications," *id.* at 453 (Stevens, J., concurring), which reflects an antidifferentiation approach. Unlike the opinion by Justice White, this opinion did not offer any examples in which a governmental entity created a preferential program for individuals with disabilities, so it does not precisely explain how such measures would be evaluated under the single-tier framework. Given the antisubordination strand in their opinion, however, it does appear likely that both Justices would have endorsed special treatment for individuals with disabilities. Because that question was not directly before the Court in *City of Cleburne*, they may not have perceived any reason to comment on that possibility. Justice Stevens formally joined the majority opinion by Justice White, including its statements about special treatment. Justice Burger did not join the majority opinion, so his position on the constitutionality of special treatment for individuals with mental retardation is unknown.

It turns *City of Cleburne* on its head to say that the majority chose rational basis scrutiny because it wanted to restrict the power of Congress to impose affirmative obligations on the states to benefit individuals with disabilities.[188] In fact, the majority's belief that Congress would be imposing those obligations on the states led it to choose rational basis scrutiny. When the Court decided *City of Cleburne*, it was specifically aware of the history of discrimination against individuals with disabilities in our country, because the *City of Cleburne* fact pattern was one of those examples. More generally, the eloquent concurrence by Justice Marshall detailed that history. The majority did not choose rational basis scrutiny because it failed to believe that such discrimination occurred. It chose rational basis scrutiny because it had confidence that federal and state governments were seeking to create affirmative rights for individuals with disabilities. "That a civilized and decent society expects and approves such legislation indicates that governmental consideration of those differences in the vast majority of situations is not only legitimate but also *desirable*."[189] The majority then hinted that such legislation might be harder to justify under heightened scrutiny, but that such problems would lessen under rational basis scrutiny.[190] Most importantly, not one member of the Supreme Court in *City of Cleburne* hinted that the various opinions were intended to strike a death knell for federal legislation designed to assist individuals with disabilities. Only a majority of the Court insisted on rational basis scrutiny, but eight members of the Court explicitly agreed on the need to have affirmative legislative protections for individuals with disabilities.

It is also important to recognize that the Court did *not* choose rational basis scrutiny because it doubted whether individuals with disabilities were a discrete and insular class.[191] Rather, it merely did not think the group

188. Nonetheless, that position has been taken by some lower court judges. *See, e.g.*, Pierce v. King, 918 F. Supp. 932, 940 (E.D.N.C. 1996), *aff'd*, 131 F.3d 136 (4th Cir. 1997), *vacated on other grounds*, 119 S. Ct. 33 (1998) (mem.) (concluding that section five only permits Congress to enact legislation in a "neutral manner," rather than in a "positive" manner).

189. *City of Cleburne*, 473 U.S. at 444 (emphasis added).

190. The Court stated:

> It may be, as [the plaintiff] contends, that legislation designed to benefit, rather than disadvantage, the retarded would generally withstand examination under a test of heightened scrutiny. The relevant inquiry, however, is whether heightened scrutiny is constitutionally mandated in the first instance. . . . Especially given the wide variation in the abilities and needs of the retarded themselves, governmental bodies must have a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts.

Id. at 444–45 (citation omitted).

191. The majority described individuals with mental retardation as "different, immutably so." *Id.* at 442.

would benefit from the inflexibility of the strict scrutiny test, which would unduly hamper states in their ability to enact special protection legislation. Of special importance for this Article's section five analysis, the Court recognized the importance of *federal* legislation that prohibited discrimination on the basis of disability, such as the Individuals with Disabilities Education Act and section 504 of the Rehabilitation Act.[192] It is fair to speculate that the *Cleburne* Court would have been shocked to learn that its opinion could be used to *strike down* federal legislation, such as ADA Title II, that seeks to extend the nondiscrimination protections created under section 504. Hence, the *City of Cleburne* decision clearly supports the compatibility of the antidifferentiation and antisubordination perspectives underlying the law of disability discrimination. While the Court felt comfortable striking down a zoning ordinance that was rooted in animus against individuals with mental retardation, it deliberately chose a framework that would not put an end to special protection.

In sum, the antidifferentiation and antisubordination frameworks have been able to cohabit in harmony under the law of disability discrimination. Merely because a program offers a special benefit to individuals with disabilities does not mean that it takes away opportunities from nondisabled individuals. The affirmative action cases have sometimes raised such conflicts, and, in such contexts, the Court has sometimes chosen the antidifferentiation perspective over the antisubordination perspective. But it is wrong to generalize from the affirmative action cases that the antisubordination framework has no place under section one of the Fourteenth Amendment. Instead, we should step back from those cases and see that the Court generally recognizes both an antidifferentiation and an antisubordination framework; the antisubordination framework gives way to the antidifferentiation framework only in certain situations in which the rights of some individuals are unduly burdened by the special protection rights accorded to other individuals.[193]

192. *See supra* note 182 and accompanying text.

193. I have deliberately used the phrase "unduly burdens," because the Court has consistently permitted some burdens to be imposed on some individuals to remedy discrimination against other individuals. The Court is engaged in a balancing test—when certain individuals have provided convincing evidence of past discrimination, the Court is willing to permit some burdens on other individuals. As the evidence of past discrimination becomes more amorphous, the Court is less tolerant of burdens on others. This Article does not precisely describe the degree of burden permitted by the Court to justify special protection legislation, because the ADA does not impose direct burdens on any identifiable concrete group.

III. ADA TITLE II

A. Introduction

In the last several years, the Eighth Circuit[194] and six district courts[195] have concluded that Congress exceeded its enforcement authority under section five of the Fourteenth Amendment when it enacted ADA Title II and provided for a private right of action for monetary relief. Dissenting judges in the Fourth, Fifth, and Eleventh circuits have adopted this view.[196] By contrast, the Seventh and Ninth Circuits have unanimously concluded that ADA Title II constitutionally abrogates state sovereign immunity.[197] The other circuits have not yet decided this issue.

The analysis offered by these courts of ADA Title II's constitutionality has not followed the principles discussed in this Article. Courts have failed

194. *See* Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999), *cert. granted*, 2000 WL 63302 (U.S. Jan. 25, 2000) (No. 99-423); *see also* Humenansky v. Regents of the Univ. of Minn., 152 F.3d 822, 826–28 (8th Cir. 1998) (holding that the ADEA was an invalid exercise of Congress's Fourteenth Amendment, section five enforcement powers).

195. *See* Hedgepeth v. Tennessee, 33 F. Supp. 2d 668, 677 (W.D. Tenn. 1998) ("Congress did not have the authority to enact the accommodation provisions of the ADA, and Congress did not effectively abrogate the states' Eleventh Amendment sovereign immunity with respect to those provisions."); Kilcullen v. New York State Dep't of Transp., 33 F. Supp. 2d 133, 152 (N.D.N.Y. 1999) ("[T]he accommodation requirement, and thus the employment anti-discrimination provision which contains it, is an invalid exercise of Congress's enforcement power under section 5 of the Fourteenth Amendment"); Garrett v. Board of Trustees, 989 F. Supp. 1409, 1410 (N.D. Ala. 1998) ("Congress cannot stretch Section 5 and the Equal Protection Clause of the Fourteenth Amendment to force a state to provide allegedly *equal* treatment by guaranteeing *special* treatment or 'accommodation' for disabled persons . . . ."); Brown v. North Carolina Div. of Motor Vehicles, 987 F. Supp. 451, 459 (E.D.N.C. 1997) (holding that Congress does not have the power under the Fourteenth Amendment "to single out disabled individuals for advantageous treatment"); Nihiser v. Ohio Envtl. Protection Agency, 979 F. Supp. 1168 (S.D. Ohio 1997) (holding that Congress does not have the power to abrogate the sovereign immunity of states from suit by private persons under the ADA through the provision of the reasonable-accommodation requirement); Pierce v. King, 918 F. Supp. 932, 940 (E.D.N.C. 1996), *aff'd*, 131 F.3d 136 (4th Cir. 1997), *vacated on other grounds*, 119 S. Ct. 33 (1998) (mem.) ("Unlike traditional anti-discrimination laws, the ADA *demands* entitlement in order to achieve its goals. This the Fourteenth Amendment cannot authorize."). *But see* Johnson v. State Tech. Ctr., 24 F. Supp. 2d 833, 844 (W.D. Tenn. 1998) ("[T]his court agrees with the majority of the courts that have faced this issue and concludes that the ADA . . . did validly abrogate the State's Eleventh Amendment immunity."); Lamb v. John Umstead Hosp., 19 F. Supp. 2d 498, 510 (E.D.N.C. 1998) ("[T]he enactment of the ADA falls within Congress's Section 5 enforcement power and consequently constitutes a valid and effective abrogation of the States' immunity to suit.").

196. *See* Amos v. Maryland Dept. of Pub. Safety & Correctional Servs., 178 F.3d 212, 225 (4th Cir. 1999) (Williams, J., dissenting); Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1444 (11th Cir. 1998) (Cox, J., dissenting), *aff'd*, Nos. 98-791, 98-796, 2000 WL 14165 (U.S. Jan. 11, 2000); Coolbaugh v. Louisiana, 136 F.3d 430, 439 (5th Cir. 1998) (Smith, J., dissenting).

197. *See* Clark v. California, 123 F.3d 1267 (9th Cir. 1997); Crawford v. Indiana Dep't of Corrections, 115 F.3d 481 (7th Cir. 1997).

to understand that Congress may enact legislation that goes beyond the Supreme Court's prior decisions regarding unconstitutionality under section one so long as the four principles are met. They have confused the standards under section one of the Fourteenth Amendment for determining whether states have *violated* section one with the standards under section five for determining whether Congress is *empowered* to enforce the Fourteenth Amendment.[198]

Nonetheless, I would not suggest that the question of whether ADA Title II meets the requirements of section five is an easy one. I shall now apply the four principles to ADA Title II to determine if its enforcement scheme passes constitutional muster, recognizing that principle four poses the most significant hurdle.

B. Explicit Abrogation

ADA Title II readily meets the explicit abrogation requirement, if that requirement is applicable to ADA Title II. Under the explicit abrogation requirement, Congress must provide a plain statement of abrogation of state sovereign immunity if the legislation intrudes into an essential state function. Although it is possible that ADA Title II intrudes into essential state functions in some minor areas, it is unlikely that the title as a whole does so. States provide transportation, education, housing, and many other services that are also provided by the private sector and are not central to a state's functioning. Nonetheless, on the assumption that a court would

198. Judge Boyle took that position in *Brown v. North Carolina Division of Motor Vehicles* in which he concluded that Congress may not ground its action on the Fourteenth Amendment if the class of individuals being protected is not entitled to heightened scrutiny. *See Brown*, 987 F. Supp. at 457; Jesse H. Choper, *On the Difference in Importance Between Supreme Court Doctrine and Actual Consequences: A Review of the Supreme Court's 1996–1997 Term*, 19 CARDOZO L. REV. 2259, 2298–2302 (1998) (suggesting that Congress has the authority to provide protections for nonsuspect classes against state action but only if the Court can be persuaded that much of the conduct outlawed by the federal statute has a significant likelihood of being unconstitutional); S. Elizabeth Wilborn Malloy, *Whose Federalism?*, 32 IND. L. REV. 45, 65 (1998) (suggesting that Congress has the authority to provide protections for nonsuspect classes against state action so long as "Congress . . . find[s] facts that demonstrate the existence of invidious discrimination in a law which would otherwise withstand rational basis scrutiny"); Thro, *supra* note 55, at 520 (suggesting that Congress has the power to protect nonsuspect classes from equal protection violations so long as those prohibitions are "coextensive with the Fourteenth Amendment"); *see also* Note, *Section 5 and the Protection of Nonsuspect Classes After* City of Boerne v. Flores, 111 HARV. L. REV. 1542, 1552 (1998) (arguing that Congress has the authority to protect nonsuspect classes against state action but only if Congress creates a strong record that a group is subject to arbitrary or invidious discrimination). *See generally* Elizabeth Welter, Note, *The ADA's Abrogation of Eleventh Amendment State Immunity as a Valid Exercise of Congress's Power to Enforce the Fourteenth Amendment*, 82 MINN. L. REV. 1139 (1998).

conclude that some or all of these activities meet the essential state function test, it is clear that ADA Title II meets the explicit abrogation requirement.

ADA Title II directly regulates the states. It provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[199] The term "public entity" is defined as including "any State or local government."[200] The statute also expressly abrogates state immunity.[201] All the lower courts have agreed that the ADA does contain a clear statement of abrogation; indeed, its abrogation could hardly be clearer.[202] Thus, it plainly meets the first principle for valid section five legislation—it explicitly abrogates state sovereign immunity.

C. Fact Finding

The factual basis for ADA Title II is also quite clear. The constitutional challenges to ADA Title II have not questioned whether Congress engaged in sufficient fact finding before enacting the ADA. The legislation was subject to numerous hearings over a period of several years, documenting the need for legislation in this area.[203] Thus, it clearly meets the second principle for valid section five legislation—Congress acted on the basis of an adequate legislative record.

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199. 42 U.S.C. § 12132 (1994).

200. *Id.* § 12131(1)(A).

201. *See id.* § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.").

202. *See, e.g.*, Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1433 (11th Cir. 1998) ("In sharp contrast to the ADEA, the ADA does include a clear statement of intent to abrogate . . . ."), *aff'd*, Nos. 98-791, 98-796, 2000 WL 14165 (U.S. Jan. 11, 2000).

203. *See, e.g.*, H.R. REP. NO. 101-485, pt. 2, at 37 (1990).

> [W]here there is no state law prohibiting discriminatory practices, two programs that are exactly alike, except for funding sources, can treat people with disabilities completely differently than others who don't have disabilities. The resulting inconsistent treatment of people with disabilities by different State or local government agencies is both inequitable and illogical for a society committed to full access for people with disabilities.

Id. at 37; *see also Americans with Disabilities Act of 1988: Hearing Before the Subcomm. on Select Educ. of the Comm. on Educ. and Labor*, 100th Cong. 26 (1988) (statement of Charles Crawford, Commissioner, Massachusetts Commission for the Blind) (comparing the daily impact of discrimination against people with disabilities with discrimination against women, minorities, and the poor); *Americans with Disabilities Act of 1989: Hearings Before the Comm. on the Judiciary and the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary on H.R. 2273*, 101st Cong. 416 (1990) (testimony of James W. Ellis, President, American Association on Mental Retardation) (arguing that state laws have not protected people with disabilities against discrimination).

D. Enforcement of a Nonfundamental Right

The third principle should also not be a significant hurdle to the constitutionality of ADA Title II, because Congress has the authority to regulate the states under section five of the Fourteenth Amendment even with regard to groups entitled to nonsuspect class treatment under section one. The right to equal protection under section one is granted to *all individuals* in our society—not only to individuals who belong to suspect classes. The Supreme Court has consistently recognized this principle through the creation of the rational basis scrutiny framework that it applies to claims of discrimination brought by nonsuspect classes under section one.[204] If nonsuspect classes have the right to bring claims of discrimination under section one, then, as a logical matter, Congress has the power to enforce those equal protection rights under section five.

The Fourteenth Amendment offers the equal protection standard to all "persons."[205] The level of scrutiny is influenced by the type of alleged discrimination, but it is simply not true that the Fourteenth Amendment fails to apply for those individuals in classes not subjected to heightened scrutiny. Hence, in *City of Cleburne*, the Supreme Court struck down the city zoning regulation under the rubric of rationale basis scrutiny. If ADA Title II were inconsistent with the third principle, then the Supreme Court should have dismissed *City of Cleburne* as improperly brought under the Fourteenth Amendment, because a nonsuspect class would have no equal protection rights whatsoever.

Furthermore, as discussed above, the Supreme Court did not intend its invocation of rational basis scrutiny in *City of Cleburne* to limit Congress's power to pass legislation on behalf of individuals with disabilities. In fact, it chose rational basis scrutiny to increase the flexibility of both federal and state legislatures to enhance the legal rights of individuals with disabilities.

The fact that Congress has power to protect the rights of individuals with disabilities should be relatively noncontroversial in light of the *City of Cleburne* decision. Congress is not constrained by the limits of prior constitutional findings of violations by the Supreme Court when it has created an ample legislative record to demonstrate that enforcement legislation is necessary in the equal protection context. Thus, the only principle that should be deserving of extended discussion should be the fourth principle—whether

204. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313–16 (1976) (applying the rational basis scrutiny framework to a claim of age-based discrimination).

205. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Congress violated a nonprotected group's constitutional rights when according special protection to another group.

E. Violation of a Constitutional Right

The fourth principle represents the most significant hurdle for ADA Title II, because the title arguably provides special protection rights for individuals with disabilities. Do those rights conflict with the rights of others?

States have argued that even if Congress has enforcement authority for a group that is not a suspect class, that enforcement authority cannot accord "special treatment" through, for example, a reasonable accommodation requirement.[206] This argument is in need of serious attention. Other commentators have ignored this issue and, instead, blended principles three and four into a single issue—assuming that if Congress has section five enforcement authority for nonsuspect classes that its enforcement authority is unlimited.[207] Lower courts have completely misunderstood this issue, assuming that they should apply the rational basis scrutiny framework to section five cases involving nonsuspect classes, without recognizing that that framework is only applicable to cases brought by *individuals* who claim to have been a victim of a *state's* equal protection violation under section one.

In order to apply principle number four, one must have a good sense of the scope of special protection provided by ADA Title II. Generally, the nondiscrimination principle found in ADA Title II forbids direct violations of the equal treatment principle as well as indirect violations through neutral policies that serve to exclude individuals with disabilities from benefits or programs.[208] In addition, ADA Title II envisions special treatment to enable individuals with disabilities to be able to participate fully in programs or activities by requiring "reasonable modifications to rules, policies,

206. In *Pierce v. King*, 918 F. Supp. 932 (E.D.N.C. 1996), *aff'd*, 131 F.3d 136 (4th Cir. 1997), *vacated on other grounds*, 119 S. Ct. 33 (1998) (mem.), Judge Boyle found that ADA Title II was unconstitutional, stating that the Fourteenth Amendment can only justify a right to be "treated in a neutral manner" but not a "positive right[] to entitlement against other individuals and state governments." *Id.* at 940. That decision was vacated by the Supreme Court in light of its decision in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998). Similarly, Judge Graham concluded in *Nihiser v. Ohio Environmental Protection Agency*, 979 F. Supp. 1168 (S.D. Ohio 1997), that ADA Title II was unconstitutional because it "'shifts away from similar treatment to different treatment of the disabled by accommodating their disabilities.'" *Id.* at 1173–74 (quoting Riel v. Electronic Data Sys. Corp., 99 F.3d 678, 681 (5th Cir. 1996)); *see also* Hedgepeth v. Tennessee, 33 F. Supp. 2d 668 (W.D. Tenn. 1998); Garrett v. Board of Trustees, 989 F. Supp. 1409 (N.D. Ala. 1998) (invalidating the special treatment of individuals with disabilities).

207. *See, e.g.*, Welter, *supra* note 198, at 1162 (arguing that the constitutional law of disability discrimination "presents no barrier to Congress's ability to prohibit irrational discrimination based on disability").

208. *See* 42 U.S.C. § 12132 (1994).

or practices, the removal of architectural . . . barriers, or the provision of auxiliary aids and services."[209] In the employment context, ADA Title II uses the standards set forth in ADA Title I (the employment title).[210] Those standards, in turn, require that employers make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability."[211]

The requirements to create "reasonable modifications" or "reasonable accommodations," however, are not unlimited. Title I explicitly recognizes an "undue hardship" defense.[212] Courts have consistently interpreted that defense to mean that individuals with disabilities never have the statutory right to "bump" a nondisabled employee from his or her employment position.[213] In the regulations promulgated under ADA Title II, the Department of Justice's regulations recognize that a reasonable modification is not necessary when "making the modifications would fundamentally alter the nature of the service, program, or activity."[214]

The Supreme Court has also recognized the limits contained in ADA Title II for the reasonable modification requirement in a case challenging the failure of the state to offer individuals with mental disabilities the

209. *Id.* § 12131(2) (defining "qualified individual with a disability"). In this Article, I am not directly challenging the assertion that these rules can be characterized as "special protection" rules, because the lower courts have uniformly characterized them in that way. One could, however, argue that reasonable accommodation rules are merely an extension of the principle of antidiscrimination. An example can demonstrate how hard it is to classify such rules. Suppose a bakery had an entrance with a three-inch step that could not be crossed by an individual who uses a wheelchair. It would be a reasonable modification to have the step removed and replaced with a ramp. Whether you view that modification as special treatment or equal treatment may depend on how you view the problem. Is the problem that the builder and architect designed the building with nonwheelchair users in mind? Had they envisioned a world of more diversity, which included individuals who use wheelchairs, would those steps have been built in the first place? Or is the problem with the owner of the bakery who is renting that space? Should the owner of the bakery be asked to retrofit the building's design to accommodate wheelchair users? The retrofitting solution might better fit the special treatment than the equal treatment model because no action is necessary to permit nonwheelchair users to enter the store (other than opening the door) when the steps are in place. A ramp would largely serve the needs of wheelchair users (as well as parents pushing strollers). Damages against the builder and architect might better fit the antidifferentiation model, because the principle of nondiscrimination should have influenced the original choice of design.

210. *See* 28 C.F.R. § 35.140(b)(1) (1998) ("For purposes of this part, the requirements of title I of the Act, as established by the regulations of the Equal Employment Opportunity Commission . . . apply to employment in any service, program, or activity conducted by a public entity . . . .").

211. 42 U.S.C. § 12112(b)(5)(A).

212. *See id.* § 12111(10).

213. *See, e.g.*, Kralik v. Durbin, 130 F.3d 76 (3d Cir. 1997); Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996); Benson v. Northwest Airlines, Inc., 62 F.3d 1108 (8th Cir. 1995); Wooten v. Farmland Foods, 58 F.3d 382 (8th Cir. 1995); Milton v. Scrivner, Inc., 53 F.3d 1118 (10th Cir. 1995).

214. 28 C.F.R. § 35.130(b)(7).

opportunity to live in an integrated environment. The Court has interpreted the reasonable modification requirement to give the state the flexibility to protect the interests of individuals outside the plaintiff's class while also seeking to offer integrated opportunities to plaintiffs. It said:

> Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.[215]

The Court was concerned that a more limited fundamental-alteration defense could harm the interests of persons other than the plaintiffs who had mental disabilities, because it might force the state to "phase out institutions, placing patients in need of close care at risk."[216]

Thus, ADA Title II does provide special protection to individuals with disabilities in certain circumstances. Yet Congress was careful to create reasonable defenses for the states, and the courts have been careful to construe those defenses relatively broadly. Thus, ADA Title II does not, in any way, violate the constitutional rights of nondisabled individuals. In those rare cases in which special treatment would cause undue hardship to others, Congress was careful to provide for an appropriate defense. ADA Title II carefully balanced the rights of all members of our society to equal treatment while also, in some cases, providing for special protection for individuals with disabilities.

It might be the case that if the courts' interpretations of the ADA recognized fewer defenses, the ADA could run afoul of section five of the Fourteenth Amendment. But the courts have repeatedly said that we should not declare a statute unconstitutional out of fear of consequences that have not yet occurred. The Supreme Court's recent decision in *Olmstead* has ensured that ADA Title II will be interpreted to give a state the flexibility to consider the needs of all its citizens as it meets the special protection needs of some individuals with disabilities. It therefore appears that ADA Title II is a well-crafted statute that properly recognizes both the antidifferentiation and the antisubordination principles underlying the law of equal protection in the disability context. If the lower courts would begin to engage in a closer examination of both the structure of the ADA and the Supreme Court's prior case law under the Equal Protection Clause, they

215. Olmstead v. L.C., 119 S. Ct. 2176, 2178 (1999).
216. *Id.* at 2179.

would learn that ADA Title II is appropriate enforcement legislation pursuant to Congress's powers under section five of the Fourteenth Amendment.

CONCLUSION

State sovereignty is the current battleground for narrowing Congress's authority to pass legislation. Although some authorities have predicted the death knell of damages actions against state actors under the civil rights statutes in light of the Supreme Court's evolving case law in this area, I believe it is too early to predict such a dire result. The Court has not backpeddled on the fact that section five of the Fourteenth Amendment gives Congress the power to abrogate state sovereign immunity.[217] Moreover, it is unthinkable that the Court will ever strike down damages actions under CRA Title VII, given the Court's consistent statements that abrogation of state sovereign immunity was appropriate under that statute. Thus, the important challenge is to determine how the Court will develop a framework that preserves its CRA Title VII case law while also preserving its recent decisions striking down various federal statutes as abrogating state sovereign immunity.

I have argued that four principles emerge from the Court's rulings that can help reconcile these seemingly conflicting decisions. First, Congress must explicitly abrogate state sovereign immunity if the legislation infringes on a traditional and essential state function. Second, Congress must create an ample record to justify the need for such legislation. Third, Congress must be seeking to protect interests in an area in which the Court has previously found that some genuine rights exist. Fourth, Congress's enforcement efforts under section five must not, themselves, violate another section of the Constitution.

My framework makes two important and original contributions to our understanding of section five. First, it recognizes that the third principle should not play a major role in cases involving Congress's power to enforce the Equal Protection Clause. Because the Equal Protection Clause provides rights to all persons, any nondiscrimination legislation can be understood as being properly grounded in the law of equal protection. By contrast, legislation seeking to enforce the Due Process Clause may not be properly

217. It is also important to remember that even if Congress cannot abrogate state sovereign immunity pursuant to its powers under section five, it still can use the Commerce Clause to create injunctive relief against state actors. Thus, claimants like the plaintiffs in *Olmstead* should be able to obtain declaratory and injunctive relief irrespective of how the Eleventh Amendment evolves unless the Court chooses to reconsider *Ex Parte Young*, 209 U.S. 123 (1908), and *Edelman v. Jordan*, 415 U.S. 651 (1974).

grounded in a genuine constitutional right, because the Court has fashioned a more narrow enforcement standard under the Due Process Clause than under the Equal Protection Clause.

Second, my framework recognizes the importance of the fourth principle in equal protection cases. The fourth principle does not limit Congress to the legal standards previously determined by the Court under section one of the Fourteenth Amendment. Relying on the historical record, I have argued that the ratifiers and framers of the Fourteenth Amendment intended to give enforcement powers to Congress that are independent of the Court's prior decisions under section one of the Fourteenth Amendment. Nonetheless, Congress does not have the power to go so far as to violate the equality interests of nonprotected class members.

The question of whether Congress has violated the rights of nonprotected class members under the Fifth Amendment's equal protection guarantee when it has sought to create equality rights for protected class members under section five of the Fourteenth Amendment can be a difficult one. I have argued that this line is crossed only when legislation unduly burdens the rights of nonprotected class members.

ADA Title II clearly meets the requirements of section five of the Fourteenth Amendment under this proposed framework. It explicitly abrogates state sovereign immunity, was based on appropriate Congressional fact finding, protects genuine constitutional rights, and does not violate the Fifth Amendment's equal protection guarantee. The courts should not reflexively strike down ADA Title II's enforcement scheme under the fourth principle merely because it accords special protection to some groups in our society. Because this legislation does not unduly burden the rights of nonprotected class members, it clearly is in accordance with the Fifth Amendment's equal protection guarantee.

The framework that I have proposed could be used to consider the constitutionality of the abrogation of state sovereign immunity under the FMLA, the EPA, the Civil Rights Act of 1991, and other civil rights statutes. In the coming years, we can anticipate that each of these civil rights statutes will come under close constitutional scrutiny. In considering these cases, the Court should develop a framework that is consistent with the aspirations of the framers and ratifiers of the Fourteenth Amendment. There is a way to get out of the section five quagmire while retaining genuine protection against discrimination by state actors.